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No. 74-850

In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

WILLIAM G. WEBER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health, Education and Welfare, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1A–3A) is reported at 503 F. 2d 1049. The district court entered no opinion.

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* p. 5A) was entered on September 13, 1974. On December 5, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to

and including January 11, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Magistrates Act of 1968 (28 U.S.C. 636) authorizes United States district courts to refer all Social Security benefit cases to United States magistrates to prepare a recommended decision.

CONSTITUTION, STATUTES AND RULES

Relevant provisions of Article III of the United States Constitution, of the Federal Magistrates Act, of the Social Security Act, and of Rule 53, Federal Rules of Civil Procedure, are reproduced in App. D, *infra,* pp. 9A–12A.

General Order No. 104–D of the United States District Court for the Central District of California is reproduced in App. E, *infra,* pp. 13A–20A.

STATEMENT

1. Respondent William G. Weber brought this action in the United States District Court for the Central District of California under Section 205(g) of the Social Security Act [1] to obtain judicial review of a final determination by the Secretary of Health, Education, and Welfare that he was not entitled to reimbursement under Title XVIII of the Act (Medicare) [2] for medical payments made on behalf of his wife (now deceased). On the same day the complaint was

[1] 42 U.S.C. 405(g).

[2] 42 U.S.C. ch. 7, subch. XVIII. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), governs judicial review of Medicare claims. See Section 1869(b) of the Act, 42 U.S.C. (1970 ed. and 1972 supp.) 1395ff(b).

filed, the clerk of the district court assigned the case to Judge Curtis, but referred it to United States Magistrate Kronenberg "to notice and conduct such factual hearings and legal argument as may be appropriate," and to "prepare a proposed written order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate, which shall be transmitted in writing to * * * [Judge Curtis]" (R. 3).[3]

The clerk acted pursuant to General Order No. 104–D of the district court (App. E, *infra,* pp. 13A–20A), which requires reference to a magistrate for review, hearing, and preparation of a proposed decision, of various federal civil cases involving review of an administrative record, including all Social Security cases.[4]

[3] "R." designates the record on appeal, consisting of the pleadings in the district court.

[4] Section I(A) of General Order No. 104–D (App. E, *infra,* p. 15A). General Order No. 104–D states in pertinent part: "The Magistrate is authorized to notice, hear and conduct such factual hearing and legal argument as may be appropriate. Thereafter, he shall prepare a proposed written order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate, which shall be served by mail upon all parties. Any party having objections to the proposed order or decision or to any proposed finding of fact or conclusion of law shall, not later than 20 days after such service upon him, file and serve a written statement of objections with points and authorities in support thereof. Any reply to said objections and points and authorities shall be in writing and filed not later than 20 days from the date of service of said objections. No response to the reply will be received. The Magistrate shall promptly examine the documents relating to said objections and he may conduct such further hearing as he deems necessary, make such additional, supplemental or substitute proposed findings and conclusions, and such modifications

The Secretary moved to vacate the order of reference on the ground that referral of the case to a magistrate pursuant to the district court's general order violated Rule 53(b) of the Federal Rules of Civil Procedure, was not authorized under the Federal Magistrates Act of 1968, was of doubtful constitutionality, and interjected an additional level of review in the district court in contravention of the judicial review provisions of the Social Security Act (R. 6).

The district court denied the Secretary's motion to vacate the order of reference, but certified the issue for interlocutory appeal under 28 U.S.C. 1292(b) (App. C, *infra,* pp. 7A–8A). The court of appeals accepted the Secretary's interlocutory appeal.[5]

The court of appeals affirmed the order of reference (App. A, *infra,* pp. 1A–3A). The court summarized the basic operation of General Order No. 104–D as follows (App. A, *infra,* p. 3A):

> [T]he procedure followed under the rule objected to is for the magistrate to examine the written administrative record and make a recommendation to the judge. The parties are advised of the magistrate's initial opinion and are afforded time to present objections. If objection be made, an opportunity is given to present briefs and argument in support thereof. The magistrate may then revise his original recommendation or adhere to it. Under either contingency he then forwards his recommendation and the administrative record together with a report of proceedings before him, if any, to the judge for final action.[6]

The court of appeals concluded, without elaboration (*ibid.*):

> [W]e hold that the delegated authority is well within the intent of Congress in adopting the Magistrate Act; that the judicial review contemplated by the Social Security Act is adequately provided and that the procedure comports with the requirement of exercise of judicial power under Article III of the United States Constitution.

REASONS FOR GRANTING THE WRIT

This case presents an important issue of judicial administration that calls for review by this Court: the propriety of a growing tendency among the district courts to refer whole categories of important cases to

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in the proposed judgment, as he deems appropriate and, if such are made, shall serve them by mail upon all parties. * * * When the Magistrate has taken the action which he deems appropriate and a transcript has been filed (when a transcript is required), the Magistrate shall forward the entire file to the Judge to whom the matter is assigned for final action and notify the parties accordingly. Upon receipt of the file, the Judge will calendar the matter for oral argument before him if he deems it necessary or appropriate." App. E, *infra,* pp. 13A–14A.

[5] Respondent Weber took no position on the reference of his case to a magistrate and did not participate in the appeal. However, the government's position was opposed by the National Council of United States Magistrates, which participated in the appeal as *amicus curiae,* filing a brief and presenting oral argument.

[6] General Order No. 104–D also authorizes the magistrate to make "findings of fact" (App. E, *infra,* p. 13A). The court considered this to be surplusage in the context of Social Security cases, in view of the statutory requirement (42 U.S.C. 405(g)) of review under the substantial evidence standard (App. A, *infra,* p. 3A n. 1).

United States magistrates to prepare recommended decisions.[7] The holding of the court of appeals approving that practice here conflicts with the decision of the Court of Appeals for the Sixth Circuit in *Ingram* v. *Richardson,* 471 F. 2d 1268, which disapproved a similar reference of a social security case to a magistrate. As we show below, the Federal Magistrates Act of 1968 does not authorize this practice.

1. The Federal Magistrates Act of 1968[8] authorized the district courts to establish rules pursuant to which United States magistrates may be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. 636(b). Under that provision the "additional duties" authorized by district court rule may include, but are not restricted to: (1) "service as a special master in an appropriate civil action, pursuant to * * * the Federal Rules of Civil Procedure * * *" (2) "assistance to a district judge in the conduct of pretrial or discovery proceedings * * *" and (3) review of applications for posttrial relief in criminal cases, to facilitate the decision on whether to hold a hearing.

A growing number of district courts have established rules under the "additional duties" provision authorizing or requiring reference of all Social Security cases (and other federal civil cases involving re-

[7] The issue was not resolved by this Court's decision in *Wingo* v. *Wedding*, No. 73-846, decided June 26, 1974, which held that the Magistrates Act did not authorize magistrates to conduct evidentiary hearings in *habeas corpus* cases. *Wingo* turned on the language of 28 U.S.C. 2243, governing applications for *habeas corpus*.

[8] 82 Stat. 1107, 1113.

view of an administrative record)[9] to United States magistrates to prepare recommended decisions. The General Order of the district court in this case (General Order No. 104–D, App. E, *infra,* pp. 13A–20A), is typical of such rules. Under these provisions, the practice is developing under which the district court customarily adopts the magistrate's proposed decision as that of the court.[10]

During the fiscal year 1974, magistrates were used by 26 of the 91 United States district courts to prepare recommended decisions in Social Security cases. They followed that practice in 277 of those cases,[11] which is 10 percent of the total of 2,783 Social Security cases[12] terminated in all district courts in that year.

[9] *E.g.*, review of orders of the Interstate Commerce Commission, orders of the Immigration and Naturalization Service, adverse actions of the Civil Service Commission, and administrative denial of licenses. See, *e.g.*, General Order No. 104–D of the Central District of California (App. E, *infra*, pp. 13A–20A); Local Court Rule 290 of the Northern District of Georgia, set forth in *Bell* v. *Weinberger*, 378 F. Supp. 198, 202–203 (N.D. Ga.).

[10] We have examined all cases referred to magistrates in the Central District of California (10) and the Northern District of Georgia (28) in fiscal year 1974. In 30 of the 38 cases, the district court adopted the magistrate's recommended decision; in the other 8 cases there was a stipulated remand to the Secretary for further evidence. In no case did the judge reject the magistrate's recommendation.

[11] 1974 Annual Report of the Director, Administrative Office of the United States Courts, pp. A–102, A–103, table M 4 (hereinafter cited as 1974 Annual Report).

[12] *Id.* at p. A–25, table C 4.

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Until this Court resolves the issue, there is likely to be further substantial and time-consuming litigation of a collateral issue in Social Security cases. The government believes, as the Sixth Circuit ruled in *Ingram* (see below), that the Federal Magistrates Act does not authorize referral of Social Security cases to magistrates. See 38 Fed. Reg. 34203, 28 C.F.R. 50.11. Accordingly, it has objected to all references of Social Security cases to magistrates. In some cases Social Security claimants have joined with the government in objecting to the reference, because of the additional burdens that the two-step procedure of review involved in the use of magistrates imposes upon them. See, *e.g., Bane* v. *Weinberger,* C.D. Cal., No. 72–2243–IH(P), decided December 11, 1974; *Sullivan* v. *Weinberger,* C.D. Cal., No. 73–2439–RF(K), dismissed October 30, 1974.

2. The decision in this case conflicts with *Ingram* v. *Richardson,* 471 F. 2d 1268 (C.A. 6), where the court of appeals ruled that "[i]t was error for the District Court to refer [this Social Security] case to the magistrate" (*id.* at 1272). The case involved a social security disability claim, which the Secretary denied. The claimant sought review in the district court, and the case was referred, without objection from either party, to a magistrate, whose recommended decision in favor of the Secretary the district court adopted (*id.* at 1269–1270).

On appeal, the court of appeals *sua sponte* first considered the propriety of the reference to a magistrate, and concluded that it constituted an improper

reference to a special master because no "exceptional conditions" existed.[14] On the merits, however, the court reversed the Secretary's finding that the claimant was not disabled as not supported by substantial evidence. While the ruling on the magistrate issue technically was thus dictum, it announced the rule for the Sixth Circuit. If the instant case had arisen in that circuit, the decision on the propriety of the reference would have been the other way.

3. The court of appeals erred in holding that reference of Social Security cases to magistrates to prepare a recommended decision "is well within the intent of Congress in adopting the Magistrate Act" (App. A, *infra,* p. 3A).

a. The Magistrates Act permits the magistrate to serve, among other things, "as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure * * *." 28 U.S.C. 636(b)(1). Rule 53 of those rules, which deals with masters, provides in subsection (b) that "[a] reference to a master shall be the exception and not the rule," and states that in nonjury cases reference to a master "shall be made only upon a showing that some exceptional condition requires it." The reference of a Social Security case to a magistrate to prepare a recommended decision is a reference to a special master; the preparation of such a decision is a typical function assigned to a master. Cf. *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249, 253.

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[14] The court of appeals in the instant case specifically rejected the contention that a Social Security reference was a reference to a special master (App. A, *infra,* p. 2A).

The legislative history of the Magistrates Act shows that Congress was particularly concerned that use of magistrates be made in compliance with Rule 53(b). The Senate Report, noting this court's decision in *LaBuy* v. *Howes Leather Co., supra,*[15] stressed that the limitations upon the use of magistrates in Section 636(b)(1), including Rule 53(b), were designed to "protect against any abdication of the decisionmaking responsibility that is properly that of the district courts." S. Rep. No. 371, 90th Cong., 1st Sess., p. 25. Automatic reference of all Social Security cases to magistrates, without consideration of whether the particular case involves "exceptional circumstances" that warrant such action, is precisely the type of "abdication of decisionmaking responsibility" which Congress sought to avoid in the Magistrates Act.[16]

b. Even if Migistrates are not special masters, the Magistrates Act does not permit the significant delegation of judicial functions that the blanket referral procedure involves. Section 636(b) permits assignment to magistrates of such "additional duties" as are not inconsistent with the Constitution and laws of the United States. In the Magistrates Act, Congress ex-

[15] *LaBuy* held that crowded dockets did not constitute an "exceptional condition" under Rule 53. 352 U.S. at 258–259.

[16] Although Social Security cases do not require fact finding by the magistrate, but usually a determination whether substantial evidence in the record supports the findings, this distinction does not justify a blanket reference of all such cases to a master. Masters are authorized to make proposed conclusions of law as well as findings of fact. Rule 53(e)(1). In either situation Congress intended that only exceptional circumstances would warrant the delegation of such functions to a non-Article III judge.

pressly assigned minor criminal jurisdiction to magistrates, with the consent of the parties and a right to "appeal" to the district judge.[17] In light of this provision, the district courts' authority to give magistrates "additional duties" does not empower them to assign to these officers such a major judicial function as initially reviewing Social Security cases.

The Magistrates Act was enacted "to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers." S. Rep. No. 371, 90th Cong., 1st Sess., p. 9; H. Rep. No. 1629, 90th Cong., 2d Sess., p. 12. There is no indication, however, that Congress thought that the major role that the magistrate performs in the decisionmaking function under the reference is a task "more desirably performed by a lower tier of judicial officers."[18]

In *TPO, Inc.* v. *McMillen,* 460 F. 2d 348 (C.A. 7), the court held that a magistrate had no power under the Act to adjudicate a dispositive motion, but also expressed doubt "that situations of this kind would be remedied by the magistrate's simply recommending to the district judge instead of adjudicating." 460 F. 2d at 360–361 n. 62. The court cited *Rainha* v. *Cassidy,* 454 F. 2d 207, 208 (C.A. 1), which disapproved any procedure that was only "a pro forma laying on of hands by the district court"; and observed that the full exercise of adjudicative respon-

[17] Section 302 of the Magistrates Act, 82 Stat. 1115–1116, amending 18 U.S.C. 3401(b) and 3402.

[18] There is no mention in the legislative history of the Magistrates Act of any such scheme.

sibility by the district judge in a reference situation (by an "appeal" from a magistrate's decision) "would conceivably [be] a greater burden than * * * simply performing its own adjudications." 460 F. 2d at 361. Congress did not intend such a result when it enacted the "additional duties" provision of the Magistrates Act.

c. The referral procedure also violates Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), authorizing the district courts to render a decision "upon the pleadings and transcript of the record." This language contemplates an expeditious review of the case by a judge based on the administrative record. Under the referral procedure the judge also reviews the recommended decision of a magistrate, and, indeed, is likely to base his judgment primarily on that recommendation, rather than on the parties' arguments and the administrative record.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
MORTON HOLLANDER,
MICHAEL KIMMEL,
Attorneys.

JANUARY 1975.

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APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 73-3593

WILLIAM G. WEBER, PLAINTIFF-APPELLEE,

v.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT-APPELLANT.

SEPTEMBER 13, 1974

On appeal from the United States District Court for the Central District of California

Before: CHAMBERS and CHOY, *Circuit Judges,* and MCNICHOLS* *District Judge.*

PER CURIAM:

This interlocutory appeal presents another in what will, no doubt, be an ongoing series of cases designed to judicially establish the perimeters of powers and duties which may be delegated to United States magistrates under the broad general authority statutorily provided by 28 U.S.C. § 636(b).

General Order No. 104-D adopted by the district court provides, *inter alia,* for reference to a full-time U.S. magistrate of all "actions to review administra-

*Honorable Ray McNichols, Chief Judge, United States District Court for the District of Idaho, sitting by designation.

tive determinations re (sic) entitlement to benefits under the Social Security Act and related statutes, including but not limited to actions filed under 42 U.S.C. § 405(g)".

William G. Weber (herein designated as "appellee", but not truly a party to this appeal) brought an action in the district court to review a final determination of the Secretary as authorized by 42 U.S.C. § 405(g). The case was referred to a magistrate as provided by General Order No. 104–D. A motion by the Secretary praying to have the order of reference rescinded was denied and subsequently authorization for this interlocutory appeal as permitted by 28 U.S.C. § 1292(b) was granted.

The Secretary initially contends that the rule calling for routine references of action seeking judicial review of Social Security cases constitutes a blanket reference to special masters and is thus repugnant to Rule 53(b), Federal Rules of Civil Procedure. We simply disagree with this analysis.

Of more moment is appellant's attack on the practice of the court below (1) as being beyond the intended authority of the Federal Magistrate Act; (2) as contravening the purposes of the judicial review provided for under the Social Security Act; and (3) as inconsistent with Article III of the United States Constitution.

For the purposes of this appeal we are only interested in what this case *is* about, not what it *might have been* about.

The scope of judicial review of final determinations by the Secretary in actions such as that before us is narrowly circumscribed by the statute. The district court is limited to an examination of the administrative record to determine if there is substantial evidence in the record to support the decision of the Secretary. The findings of the Secretary as to any

fact, if supported by substantial evidence, is conclusive.[1] Appellant conceded at argument that the procedure followed under the rule objected to is for the magistrate to examine the written administrative record and make a recommendation to the judge. The parties are advised of the magistrate's initial opinion and are afforded time to present objections. If objection be made, an opportunity is given to present briefs and argument in support thereof. The magistrate may then revise his original recommendation or adhere to it. Under either contingency he then forwards his recommendation and the administrative record together with a report of proceedings before him, if any, to the judge for final action.

As so applied, we hold that the delegated authority is well within the intent of Congress in adopting the Magistrate Act; that the judicial review contemplated by the Social Security Act is adequately provided and that the procedure comports with the requirement of exercise of judicial power under Article III of the United States Constitution. Were the broad provisions of General Order No. 104–D to be resorted to in the type of judicial review before us, the Secretary might have grounds to complain. As applied, the rule is not vulnerable to the attack here mounted.

We believe our holding is consistent with the teachings of both *Wingo v. Wedding,* —— U.S. ——, 42 U.S.L.W. 5167 (S. Ct. June 26, 1974) and *Campbell v. United States District Court,* — F. 2d —— (9th Cir. 1974), (Case #73–3022, Slip Opinion April 19, 1974, amended Aug. 15, 1974).

Affirmed.

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[1] In view of this limitation on the scope of review, the language in General Order No. 104–D providing for findings by the magistrate is at worst surplusage.

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APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 73-3593 (D.C. 73-2431)

WILLIAM G. WEBER, PLAINTIFF-APPELLEE

v.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Central District of California

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THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 13, 1974.

APPENDIX C

United States District Court, Central District of California

Civil No. 73-2431-JWC(K)

WILLIAM G. WEBER, PLAINTIFF,

v.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT.

Order denying defendant's motion to vacate notice and order of reference to magistrate; and, certification for interlocutory appeal

This matter came on for hearing of defendant's Motion to Vacate Notice and Order of Reference to Magistrate Pursuant to General Order 104-D on November 19, 1973; there was no appearance for the plaintiff, and the defendant was represented by William D. Keller, United States Attorney, Frederick M. Brosio, Jr., Assistant U.S. Attorney, Chief, Civil Division, Carolyn M. Reynolds, Assistant U.S. Attorney, by Carolyn M. Reynolds, and after a thorough consideration of the Motion and the Memorandum of Points and Authorities in Support thereof, and being fully advised, Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that defendant's Motion to Vacate Notice and Order

of Reference to Magistrate Pursuant to General Order 104–D be, and the same is hereby, denied.

The Court, finding that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation, hereby certifies this Order for an interlocutory appeal pursuant to 28 U.S.C. 1292(b).

DATED: This 26 day of November, 1973.

JESSE W. CURTIS,
United States District Judge.

ENTERED:
November 28, 1973

APPENDIX D

Constitution, Statutes and Rules

1. Article III of the United States Constitution provides in pertinent part:

> SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States * * *.

2. Section 101 of the Federal Magistrates Act of 1968, 82 Stat. 1107, 1108, 1113, added a new section 636(b) of Title 28, United States Code, which provides:

> (b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional

duties authorized by rule may include, but are not restricted to—

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery procedings in civil or criminal actions; and

(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

3. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides:

(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming,

modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

4. Rule 53, Federal Rules of Civil Procedure, provides in pertinent part:

(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

* * * * *

(e) *Report.*

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

APPENDIX E

United States District Court Central District of California

General Order No. 104–D

Referral of various types of civil matters to the full-time magistrates and procedures to be followed therein

Upon the filing of any case of the types listed under I and II below, the case shall be assigned to a Judge of this Court by the drawing of a card under the regular and usual system. Immediately after said Judge's card is drawn and the case is assigned to him, a card shall be drawn by lot for assignment of the same case to one of the full-time Magistrates. Each of said cases is hereby referred to the full-time Magistrate so drawn. A document reciting that the case has been referred under this General Order and specifying the Magistrate to whom it was referred shall be entered in the file and a copy of said document shall be transmitted to the Judge involved. A copy of said document shall be served by plaintiff with the summons and complaint on each defendant served. The Magistrate is authorized to notice, hear and conduct such factual hearing and legal argument as may be appropriate. Thereafter, he shall prepare a proposed written order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate, which shall be served by mail upon all par-

ties. Any party having objections to the proposed order or decision or to any proposed finding of fact or conclusion of law shall, not later than 20 days after such service upon him, file and serve a written statement of objections with points and authorities in support thereof. Any reply to said objections and points and authorities shall be in writing and filed not later than 20 days from the date of service of said objections. No response to the reply will be received. The Magistrate shall promptly examine the documents relating to said objections and he may conduct such further hearing as he deems necessary, make such additional, supplemental or substitute proposed findings and conclusions, and such modifications in the proposed judgment, as he deems appropriate and, if such are made, shall serve them by mail upon all parties. If said objections attack any proposed finding of fact which is not rendered moot by an additional hearing, supplemental or substitute findings and/or modified judgment, and if an evidentiary hearing was conducted by the Magistrate, the dissatisfied party shall promptly obtain and file a transcript of the hearing or pertinent part thereof. The Magistrate may fix the time for obtaining the transcript and upon a showing of unavoidable delay, extend the time for filing the transcript. When the Magistrate has taken the action which he deems appropriate and a transcript has been filed (when a transcript is required), the Magistrate shall forward the entire file to the Judge to whom the matter is assigned for final action and notify the parties accordingly. Upon receipt of the file, the Judge will calendar the matter for oral argument before him if he deems it necessary or appropriate.

I. MATTERS IN WHICH THE DISTRICT COURT IS CALLED ON TO REVIEW AN ADMINISTRATIVE OR JUDICIAL RECORD

(A) Actions to review administrative determinations re entitlement to benefits under the Social Security Act and related statutes, including but not limited to actions filed under 42 U.S.C. § 405(g).

(B) Actions filed by the United States or a carrier to review, implement or restrain orders of the Interstate Commerce Commission re freight overcharges, including but not limited to actions under 28 U.S.C. § 1336 and 49 U.S.C. § 304a.

(C) Actions, whether in the form of judicial review, habeas corpus or otherwise, for review of orders and other actions of the Immigration and Naturalization Service. Included, but not by way of limitation, are actions involving deportation orders, denial of preference classification visas and denial of petitions to adjust status.

(D) Actions for review of adjudications by the Civil Service Commission, or the various departments or agencies, involving personnel actions such as wrongful discharge, reductions in force, transfers, retirements, etc.

(E) Actions for review of an order of any branch or establishment of the military service denying discharge of petitioner from the military, whether such actions are brought in the form of petitions for judicial review, habeas corpus or actions for declaratory relief and injunction.

(F) Actions filed pursuant to 18 U.S.C. § 923(f)(3) to review administrative decisions denying applications for licenses to engage in business as a firearms or ammunition importer, manufacturer or dealer.

(G) Actions to review administrative decisions by the Department of Labor denying applications for

alien employment certification required pursuant to the provisions of 8 U.S.C. § 1182(a)(14).

II. ACTIONS FOR THE COLLECTION AND ENFORCEMENT OF CIVIL PENALTIES

(A) Actions to recover civil penalties relating to boating, including, but not by way of limitation, penalties under the Coordinated National Boating Safety Program (46 U.S.C. §§ 1451–89 inclusive) and penalties under the Motor Boat Act of 1940 (46 U.S.C. §§ 526–526u inclusive).

(B) Actions to recover FAA penalties imposed under the Federal Aviation Act, including, but not by way of limitation, penalties imposed under 49 U.S.C. §§ 1471 ff.

(C) Actions to recover civil bomb hoax penalties, including, but not by way of limitation, penalties under 18 U.S.C. § 35(a).

(D) Actions to recover Interstate Commerce Commission penalties including, but not by way of limitation, penalties under 49 U.S.C. § 322(h).

(E) Actions to recover penalties under the Packers and Stockyards Act, including, but not by way of limitation, penalties under 7 U.S.C. § 203.

(F) Actions to recover penalties under the Wheat Marketing Allocation Act, including, but not by way of limitation, penalties under 7 U.S.C. § 1379 i (a).

REFERENCE OF CERTAIN OTHER CIVIL MATTERS

The following additional categories of miscellaneous civil matters are referred to the Magistrates for handling:

(A) All actions and other matters involving Letters Rogatory or depositions required in connection with proceedings pending in any foreign country.

(B) All matters relating to the issuance of writs of attachment under California CCP§§ 538–9, including noticing and conducting hearings, issuance of temporary restraining orders, directing the issuance of writs of attachment after hearing, the immediate issuance of such writs without a hearing, as provided in § 538.5, the approval of bonds or other undertakings for such writs and orders enforcing liability thereon.

(C) The following categories of cases (which have not heretofore been referred to the Magistrates by previous action of the Court) are now referred to the Magistrates:

(1) Civil Rights Act cases filed by a plaintiff appearing in pro per but who is not in confinement (except those arising under Title VII Employment Discrimination).

(2) Civil Rights Act cases where plaintiff is confined but has retained counsel.

(3) Habeas corpus cases filed by present or former state prisoners having retained counsel.

Each of such cases shall be assigned to a judge of this Court by the drawing of a card under the regular and usual system. Immediately after said Judge's card is drawn and the case is assigned to him, a card shall be drawn by lot for assignment of the same case to one of the full-time Magistrates. Each of said cases is hereby referred to the full-time Magistrate so drawn as a Master and an order of reference for such case shall be entered in the file. The Magistrate is authorized to notice and conduct such factual hearing and legal argument as may be appropriate. Thereafter, he shall prepare a report and recommendation and proposed order and decision, together with findings of fact and conclusions of law where necessary or appropriate, which shall be served by mail upon all parties. Any party having objections to the proposed order shall, not later than 20 days after such

service upon him, file and serve a written statement of objections with points and authorities in support thereof. Any reply to said objections and points and authorities shall be in writing and filed not later than 20 days from the date of service of said objections. No response to the reply will be received. The Magistrate shall promptly examine the documents relating to said objections and he may conduct such further hearing as he deems necessary, make such additional, supplemental or substitute proposed findings and conclusions, and such modifications in the proposed judgment, as he deems appropriate and, if such are made, shall serve them by mail upon all parties. If said objections attack any proposed finding of fact which is not rendered moot by an additional hearing, supplemental or substitute findings and/or modified judgment, and if an evidentiary hearing was conducted by the Magistrate, the dissatisfied party shall promptly obtain and file a transcript of the hearing or pertinent part thereof. The Magistrate may fix the time for obtaining the transcript and upon a showing of unavoidable delay, extend the time for filing the transcript. When the Magistrate has taken the action which he deems appropriate and a transcript has been filed (when a transcript is required), the Magistrate shall forward the entire file to the Judge to whom the matter is assigned for final action and notify the parties accordingly. Upon receipt of the file, the Judge will calendar the matter for oral argument before him if he deems it necessary or appropriate.

GENERAL INTERPRETIVE PROVISION

Included in the delegations, appointments and grants to the Magistrates herein contained shall be all

powers reasonably necessary to implement and give effect to such delegations, appointments and grants.

The full-time Magistrate to whom any case of any of the types listed above is assigned, shall have the power, if a jury trial before a District Judge is demanded, or if the right to a trial de novo before a District Judge is asserted, to determine if such right exists and, as to jury trials, if the demand therefor has been properly and timely made. Upon his finding that the right exists as asserted, the case shall be forthwith transferred from the Magistrate to the calendar of the District Judge to whom it was originally assigned and all proceedings thereafter shall be before said Judge.

Except where inconsistent with this or any other General Order of the Court, all of the Local Rules of this Court shall be applicable to proceedings before the Magistrates.

DATED: July 9, 1973.

ALBERT LEE STEPHENS, Jr.,
Chief United States District Judge.
JESSE W. CURTIS,
United States District Judge.
E. AVERY CRARY,
United States District Judge.
FRANCIS C. WHELAN,
United States District Judge.
IRVING HILL,
United States District Judge.
A. ANDREW HAUK,
United States District Judge.
WILLIAM P. GRAY,
United States District Judge.
WARREN J. FERGUSON,
United States District Judge.

CHARLES H. CARR,
United States District Judge.
MANUEL L. REAL,
United States District Judge.
HARRY PREGERSON,
United States District Judge.
DAVID W. WILLIAMS,
United States District Judge.
ROBERT J. KELLEHER,
United States District Judge.
WM. MATTHEW BYRNE, JR.,
United States District Judge.
LAWRENCE T. LYDICK,
United States District Judge.
MALCOLM M. LUCAS,
United States District Judge.

There is no Appendix in this case, a motion having been made and granted dispensing with its printing. In addition, no opposition to the petition was filed.

Supreme Court, U. S.
FILED
JUN 13 1975
MICHAEL RODAK, JR., CLERK

No. 74-850

In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

WILLIAM G. WEBER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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v.

WILLIAM G. WEBER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–3A) is reported at 503 F. 2d 1049. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 5A) was entered on September 13, 1974. On December 5, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 11, 1975. The petition was filed on January 10, 1975, and was granted on March 24, 1975.

The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Federal Magistrates Act of 1968 (28 U.S.C. 636) authorizes United States district courts to refer all social security benefit cases to United States magistrates for review, hearing, and preparation of a recommended decision on the merits.

STATUTES, RULES AND ORDER INVOLVED

Relevant provisions of the Federal Magistrates Act, Rule 53, Federal Rules of Civil Procedure, and General Order No. 104–D of the United States District Court for the Central District of California, are reproduced at Pet. Apps. D and E, pp. 9A–20A.

STATEMENT

Respondent brought this action in the United States District Court for the Central District of California under Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), to review a final determination by the Secretary of Health, Education, and Welfare that respondent was not entitled to reimbursement under Title XVIII of the Act (Medicare) [1] for medical payments made on behalf of his wife (now deceased). On the same day the complaint was filed, the clerk of the district court assigned the case to Judge Curtis, and referred it to United States Magistrate Kronenberg "to notice and conduct such factual hearings and legal argument as may be appropriate" and to "prepare a proposed written order or decision, together

[1] 42 U.S.C. 1395, *et seq.* Section 205(g) governs judicial review of Medicare claims. See 42 U.S.C. (Supp. III) 1395ff(b).

with proposed findings of fact and conclusions of law where necessary or appropriate, which shall be transmitted in writing to * * * [Judge Curtis]" (R. 3).[2]

The clerk acted pursuant to General Order No. 104–D of the district court (Pet. App. E, pp. 13A–20A), which requires that all federal civil cases in seven categories involving review of determinations of administrative agencies be automatically referred to a magistrate for review, hearing and preparation of a proposed decision.[3] In addition to all social security

[2] "R." designates the record on appeal, consisting of the pleadings in the district court. On June 9, 1975, the Court granted our motion to dispense with the printing of an appendix.

[3] General Order No. 104–D states in pertinent part (Pet. App. E, pp. 13A–14A):

"The Magistrate is authorized to notice, hear and conduct such factual hearing and legal argument as may be appropriate. Thereafter, he shall prepare a proposed written order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate, which shall be served by mail upon all parties. Any party having objections to the proposed order or decision or to any proposed finding of fact or conclusion of law shall, not later than 20 days after such service upon him, file and serve a written statement of objections with points and authorities in support thereof. Any reply to said objections and points and authorities shall be in writing and filed not later than 20 days from the date of service of said objections. No response to the reply will be received. The Magistrate shall promptly examine the documents relating to said objections and he may conduct such further hearing as he deems necessary, make such additional supplemental or substitute proposed findings and conclusions, and such modifications in the proposed judgment, as he deems appropriate and, if such are made, shall serve them by mail upon all parties. * * * When the Magistrate has taken the action which he deems appropriate and a transcript has been filed (when a transcript is required), the Magistrate shall for-

benefit cases,[4] General Order No. 104–D also requires blanket reference to magistrates of actions to review: Interstate Commerce Commission orders concerning freight overcharges; Immigration and Naturalization Service orders concerning deportation, preference visas or adjustments of status; Civil Service Commission or other agency orders concerning personnel action; military service orders denying discharge; Treasury Department orders denying firearms-related licenses; and Labor Department orders denying alien employment certifications.[5]

ward the entire file to the Judge to whom the matter is assigned for final action and notify the parties accordingly. Upon receipt of the file, the Judge will calendar the matter for oral argument before him if he deems it necessary or appropriate."

[4] Section I(A) of General Order No. 104–D. This section requires reference to magistrates of "[a]ctions to review administrative determinations re entitlement to benefits under the Social Security Act and related statutes, including but not limited to actions filed under 42 U.S.C. § 405(g)" (Pet. App. E, p. 15A).

[5] General Order No. 104–D, Section I, provides in pertinent part that in addition to social security cases, all of the following actions involving "review [of] an administrative or judicial record" be referred to a magistrate (Pet. App. E, pp. 15A–16A):

"(B) Actions filed by the United States or a carrier to review, implement or restrain orders of the Interstate Commerce Commission re freight overcharges, including but not limited to actions under 28 U.S.C. § 1336 and 49 U.S.C. § 304a.

"(C) Actions, whether in the form of judicial review, habeas corpus or otherwise, for review of orders and other actions of the Immigration and Naturalization Service. Included, but not by way of limitation, are actions involving deportation orders, denial of preference classification visas and denial of petitions to adjust status.

"(D) Actions for review of adjudications by the Civil Service Commission, or the various departments or agencies, involving personnel actions such as wrongful discharge, reductions in force, transfers, retirements, etc.

"(E) Actions for review of an order of any branch or establishment of the military service denying discharge of petitioner from the military, whether such actions are brought in the form of petitions for judicial review, habeas corpus or actions for declaratory relief and injunction.

"(F) Actions filed pursuant to 18 U.S.C. § 923(f)(3) to review administrative decisions denying applications for licenses to engage in business as a firearms or ammunition importer, manufacturer or dealer.

"(G) Actions to review administrative decisions by the Department of Labor denying applications for alien employment certification required pursuant to the provisions of 8 U.S.C. §1182(a)(14)."

The same provision also requires reference to magistrates of all actions to recover penalties under a variety of statutes.[6] Finally, General Order No. 104–D

[6] General Order No. 104–D (II) requires that all of the following actions to collect and enforce civil penalties be referred to a magistrate (Pet. App. E, p. 16A):

"(A) Actions to recover civil penalties relating to boating including, but not by way of limitation, penalties under the Coordinated National Boating Safety Program (46 U.S.C. §§ 1451–89 inclusive) and penalties under the Motor Boat Act of 1940 (46 U.S.C. §§ 526–526u inclusive).

"(B) Actions to recover FAA penalties imposed under the Federal Aviation Act, including, but not by way of limitation, penalties imposed under 49 U.S.C. §§ 1471ff.

"(C) Actions to recover civil bomb hoax penalties, including, but not by way of limitation, penalties under 18 U.S.C. § 35(a).

"(D) Actions to recover Interstate Commerce Commission penalties including, but not by way of limitation, penalties under 49 U.S.C. § 322(h).

"(E) Actions to recover penalties under the Packers and Stockyards Act, including, but not by way of limitation, penalties under 7 U.S.C. § 203.

"(F) Actions to recover penalties under the Wheat Marketing Allocation Act, including, but not by way of limitation, penalties under 7 U.S.C. § 1379i(a)."

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provides for essentially equivalent references to magistrates of all Civil Rights Act cases filed by plaintiffs not in confinement but appearing *pro se* (except those involving employment discrimination arising under Title VII) and all such cases filed by plaintiffs in confinement who have retained counsel (Pet. App. E, pp. 17A–18A).[7]

The Secretary moved to vacate the order of reference on the ground that referral of the case to a magistrate pursuant to the district court's general order violated Rule 53(b) of the Federal Rules of Civil Procedure, was not authorized under the Federal Magistrates Act of 1968, was of doubtful constitutionality, and contravened the judicial review provisions of the Social Security Act by interjecting an additional level of review in the district court (R. 6).

The district court denied the Secretary's motion.[8] On interlocutory appeal under 28 U.S.C. 1292(b) (Pet. App. C, pp. 7A–8A), the court of appeals affirmed (Pet. App. A, pp. 1A–3A). The court summarized the basic operation of General Order No. 104–D as follows (Pet. App. A, p. 3A):

> [T]he procedure followed under the rule objected to is for the magistrate to examine the written administrative record and make a recommendation to the judge. The parties are advised of the magistrate's initial opinion and are afforded time to present objections. If objection be made, an opportunity is given to present briefs and argument in support thereof. The magistrate may then revise his original recommendation or adhere to it. Under either contingency he then forwards his recommendation and the administrative record together with a report of proceedings before him, if any, to the judge for final action.[9]

[7] The same provisions also apply to all habeas corpus cases filed by present or former state prisoners having retained counsel (*id.* at 17A).

[8] Respondent took no position on the reference of his case to a magistrate and did not participate in the appeal. The Secretary's position was opposed, however, by the National Council of United States Magistrates, which filed a brief and presented oral arguments in the court of appeals as *amicus curiae*.

The court of appeals concluded (*ibid.*):

> As so applied, we hold that the delegated authority is well within the intent of Congress in adopting the Magistrate Act; that the judicial review contemplated by the Social Security Act is adequately provided and that the procedure comports with the requirement of exercise of judicial power under Article III of the United States Constitution.

SUMMARY OF ARGUMENT

In addition to authorizing United States Magistrates to perform certain specified statutory functions, the Federal Magistrates Act authorizes district courts to assign to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States," which may include, but are not re-

[9] General Order No. 104–D also authorizes the magistrate to make "findings of fact" (Pet. App. E, p. 13A). The court considered this to be "at worst surplusage" in the context of social security cases, in view of the statutory requirement (42 U.S.C. 405(g)) that the Secretary's findings of fact be reviewed on the administrative record under the "substantial evidence" standard (Pet. App. A, p. 3A, n. 1).

stricted to, three specified functions. Pursuant to this authority, the United States District Court for the Central District of California adopted General Order No. 104–D, which requires that every one of seven categories of cases, including all social security benefit cases, be assigned to a magistrate to prepare a recommended decision. The issue in the case is whether the Magistrates Act authorizes this procedure. Although the issue arises in a social security case, the principle involved has much broader ramifications, since if the Magistrates Act permits such reference of those cases, there is no reason why it would not also be permissible in a large variety of other cases.

In the Magistrates Act, Congress gave magistrates only a limited role in the operation of the federal judicial system. District courts were not authorized to delegate to the magistrates all judicial functions that they deemed appropriate. Rather, the role of the magistrates was to assist, and lighten the workload of, district judges by performing relatively minor functions. The statutory phrase authorizing the district courts to assign to magistrates "duties * * * not inconsistent with the Constitution and laws of the United States" must be read narrowly to reflect the limitations imposed upon the magistrates.

A. The legislative history of the Magistrates Act shows that Congress intended those officers to have only limited authority. The restrictions imposed upon the use of magistrates in connection with pre-trial

and discovery proceedings and the limited circumstances in which those officers are authorized to make recommendations to the district courts, both manifest the legislative intention carefully to limit the magistrates' authority.

B. In preparing a recommended decision in a social security case, a magistrate would perform the same functions that a special master normally does. Although Section 636(b)(1) authorizes the use of a magistrate "as a special master in an appropriate civil action," he may so act only "pursuant to * * * the Federal Rules of Civil Procedure." The blanket references of all social security cases to magistrates that General Order No. 104–D requires would violate Rule 53, because that rule permits references to special masters only in exceptional cases and not routinely. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249. Such blanket reference cannot be accomplished indirectly under the general authority to assign to magistrates duties not inconsistent with the Constitution and laws of the United States. There would have been no reason for the limitations Congress provided upon the use of magistrates as special masters if those limitations could be avoided by changing the form in which cases were referred to magistrates to prepare a recommended decision.

C. The number of social security cases in the district courts is substantial and is increasing, and the thirteen or more districts that now routinely employ magistrates to prepare recommended decisions in those cases obviously believe that the procedure is a desir-

able one to lighten the burdens of the district courts. It is impossible to determine, however, whether and to what extent that use of magistrates will do so significantly or will accelerate their decisions.

While there apparently is much to be said as a policy matter for this use of magistrates, such a far-reaching change in the manner in which the district courts conduct proceedings to review decisions of administrative agencies should be made by Congress and not by the courts. Congress has not specifically focused upon this problem, and the language, statutory scheme and history of the Magistrates Act indicate that Congress intended those officers to have only a limited role. The effect upon judicial administration of blanket reference to magistrates to prepare recommended decisions in social security and other cases thus is not a permissible basis for the expansive reading of the Magistrates Act that would be necessary in order to sanction the practice.

ARGUMENT

THE FEDERAL MAGISTRATES ACT DOES NOT AUTHORIZE THE AUTOMATIC REFERENCE TO UNITED STATES MAGISTRATES OF ALL SOCIAL SECURITY CASES TO PREPARE A RECOMMENDED DECISION

In addition to authorizing United States magistrates to perform certain specified statutory functions,[10] the

[10] United States Magistrates have "all powers and duties conferred or imposed upon United States commissioners." They may conduct trials of minor offenses under 18 U.S.C. 3401, if the parties consent; impose conditions of pretrial release in non-capital cases under 18 U.S.C. 3146; and administer oaths and affirmations and take acknowledgements, affidavits and depositions. 28 U.S.C. 636(a).

Federal Magistrates Act authorizes the United States district courts to adopt rules assigning to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States," which may include, but are not restricted to—

> (1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;
>
> (2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and
>
> (3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recomendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing. [28 U.S.C. 636(b).]

Pursuant to this authority, the United States District Court for the Central District of California adopted General Order No. 104–D. It requires that every one of seven categories of cases be automatically assigned to a United States Magistrate to conduct appropriate proceedings and then to prepare a proposed order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate.

The issue in this case is whether the Federal Magistrates Act authorizes this procedure. Although the issue arises in the context of a social security case, the principle involved has much broader ramifica-

tions.[11] If the Federal Magistrates Act permits such reference of social security cases, there is no reason why reference is not also permissible in a large variety of other cases, including the six additional categories that General Order No. 104–D now covers. Moreover, in addition to those categories, many other actions of administrative agencies are reviewable in district courts pursuant either to specific statutes [12] or, assuming a basis for federal court jurisdiction, to the gen-

[11] We no longer rely upon the argument (Pet. 12) that General Order 104–D exceeds the authority granted by Section 636(b) because it is "inconsistent" with the Social Security Act. In providing for review of the Secretary's decision by "the court" on a specified record, that Act cannot be said, any more or less than most other statutes authorizing judicial review of agency action, to have required that district judges act without such assistance from magistrates as would otherwise be permissible under the Magistrates Act. Compare *Wingo* v. *Wedding*, 418 U.S. 461, 468–469, 481–482.

[12] See, *e.g.*, 5 U.S.C. 553(b)(3) (Freedom of Information Act); 12 U.S.C. (Supp. III) 1904 note and 15 U.S.C. (Supp. III) 754(a)(1) (actions of Federal Energy Administration); 28 U.S.C. 1336(a) (orders of Interstate Commerce Commission); 33 U.S.C. 921(b) (Secretary of Labor's order under Longshoremen's and Harbor Workers' Compensation Act); 42 U.S.C. 1857h–2(a)(2) (certain acts or omissions of Environmental Protection Agency Administrator under the Clean Air Act).

A district judge in the District of Columbia recently announced that he would refer "almost any complex [Freedom of Information Act] case" to a special master to prepare a recommended decision. *Schlesinger* v. *United States District Court*, No. 74–1142, certiorari denied, April 28, 1975, petition, p. 6.

eral provisions of the Administrative Procedure Act. 5 U.S.C. 703.[13] See also 28 U.S.C. 2347(b)(3).

Indeed, under this view of the Magistrates Act, it is difficult to see why a district with a heavy docket and only a small number of judges could not properly decide that because antitrust or patent cases are complex and likely to occupy all or most of a judge's time for a protracted period, those cases should be referred to a magistrate for hearing and the preparation of a recommended decision. In *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, however, this Court held that reference of an antitrust case to a special master for trial was impermissible. There is nothing in the language or history of the Magistrates Act that even suggests that Congress intended to sanction the kind of reference that this Court condemned in *La Buy*.

In determining the scope of the authority Congress intended the magistrates to exercise, it is essential to recognize the limited role that such officers were intended to have in the operation of the federal judicial system. They were not to be a lower tier of quasi-judges to whom the district courts were authorized to delegate any judicial functions that they deemed appropriate. Rather, their role was to assist and lighten

[13] *E.g.*, *Camp* v. *Pitts*, 411 U.S. 138, 140 (grant or denial of national bank charter and other rulings by Comptroller of Currency); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (approval of highway by Secretary of Transportation).

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the workload of district judges by performing relatively minor functions.

It is in the light of this background that the meaning of the statutory phrase "duties * * * not inconsistent with the Constitution and laws of the United States" must be determined. Although these words are broad, their content depends upon the scope of the authority Congress intended the magistrates to have. If, as we submit, that authority was intended to be narrow, then the words cannot be given their potentially broad reach, but instead must be read to reflect the limitations Congress imposed upon the magistrates.

The three illustrative categories of duties that Congress specifically authorized the district courts to empower magistrates to perform are significant in showing the limited authority Congress intended those officers to have. The second and third of them on their face do not authorize the reference of social security cases for preparation of a recommended decision. These categories are (2) providing "assistance to a district judge in the conduct of pretrial or discovery proceedings" and (3) "preliminary review of applications for posttrial relief" in criminal cases and recommending to the district judge whether there should be a hearing on the application. These functions are a far cry from the judicial function that General Order No. 104–D authorizes magistrates to perform.

The first category—(1) "service as a special master in an appropriate civil action"—similarly contemplates only a limited role for the magistrates, for

the Act specifies that such service is to be "pursuant to * * * the Federal Rules of Civil Procedure." Rule 53 of those rules permits a reference to a master only in the exceptional case and not routinely. See pp. 24–27, *infra*. Since, as we show below (pp. 27–29, *infra*), the reference of a social security case to a magistrate to prepare a recommended decision is essentially equivalent to a reference to serve as a special master, the blanket reference of all social security cases to magistrates cannot be justified by, and indeed is inconsistent with, the authority in the Federal Magistrates Act for magistrates to serve as special masters.

A. THE FUNCTIONS THAT THE DISTRICT COURTS MAY AUTHORIZE MAGISTRATES TO PERFORM UNDER THE MAGISTRATES ACT ARE NARROWLY LIMITED TO MATTERS ANCILLARY TO LITIGATION NOT THEMSELVES INVOLVING ADJUDICATION OF CASES

The purpose of Section 636(b) was to authorize district courts to secure the assistance of magistrates in handling various ancillary aspects of litigation,[11] leaving the judges with more time "for the careful and unhurried performance of their vital and traditional adjudicatory duties." S. Rep. No. 371, 90th Cong., 1st Sess. 26 (1967). But Congress "empha-

[11] Senator Tydings, principal sponsor of the Act, described it to the House Judiciary Committee as a means of "easing some of the routine nonjudicial burdens" of the district courts. Hearings on the Federal Magistrates Act before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess. 73 (1968).

size[d] that this provision * * * cannot be read in derogation of the fundamental responsibility of judges to decide the cases before them * * *." *Ibid.* Section 636 thus implemented the overall purpose of the Act "to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers." *Id.* at 9; H.R. Rep. No. 1629, 90th Cong., 2d Sess. 12 (1968).

The Magistrates Act derived from the study by a Senate committee in the 89th Congress of the role of United States Commissioners, whose civil jurisdiction "was limited to administering oaths and taking acknowledgements, affidavits and depositions * * *." *TPO, Inc.* v. *McMillen,* 460 F. 2d 348, 355 (C.A. 7). See generally Hearings on the United States Commissioner System before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 1st & 2d Sess., pts. 1–3 (1965 & 1966). Although there had been no significant discussion at those hearings of giving commissioners additional duties in civil cases,[15] Senator Tydings, chairman of the subcommittee that held the hearings, introduced in the 90th Congress a bill that, anticipating the general outlines of the Magistrates Act, would have authorized district courts to prescribe additional duties for magistrates such as "supervision of the conduct of any pretrial discovery proceeding in a

[15] One witness had suggested that commissioners might be used "to handle settlement conferences." Senate Hearings on the United States Commissioner System, *supra*, pt. 1, at 10.

civil or criminal action * * *." Sec. 636(b)(2), S. 3475, 89th Cong., 2d Sess. (1966)."[16]

Section 636(b) of that bill, however, was criticized as going further than was prudent or constitutionally permissible in attempting to upgrade the role of the commissioner. For example, the Judicial Conference of the United States stated that the enumeration of duties in Section 636(b) was so "broad" and "general" as to be "vulnerable to possible constitutional attack." Hearings on the Federal Magistrates Act (S. 3475, S. 945) before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. & 90th Cong., 1st Sess. 241n (1966 & 1967).

In response to such criticism, and in an effort to ensure that the duties to be performed by magistrates were kept within constitutional limits, Senator Tydings submitted a revised bill (S. 945, 90th Cong., 1st Sess. (1967)), in which the "additional duties" assignable to magistrates were "drastic[ally]" cut back. *TPO, Inc.* v. *McMillen, supra,* 460 F. 2d at 357. Under revised Section 636(b)(2), as under the Act, magistrates were merely authorized to provide "assistance to a district judge in the conduct of pretrial or discovery proceedings * * *." The Senate committee report explained that this change was to indicate more

[16] A staff memorandum accompanying a draft bill identical to S. 3475 in this respect had referred to "the holding of pretrial hearings" as among the duties courts could give to magistrates. Senate Hearings on the Federal Magistrates Act, *supra*, at 14. The staff memorandum accompanying S. 3475 omitted that language in describing the new functions that Section 636(b) would authorize courts to give magistrates.

explicitly "that the district judge is to retain ultimate responsibility for the conduct of pretrial or discovery proceedings." [17] S. Rep. No. 371, *supra,* at 25–26.[18]

The limited scope of the "assistance to a district judge in the conduct of pretrial or discovery" proceedings that Congress intended magistrates to provide is underlined by the reference in the Senate committee report to the office of the pretrial examiner in the United States District Court for the District of Columbia. *Id.* at 26. That official was then authorized only to make recommendations to the district court on various specified procedural motions and discovery matters, which did not include motions to dismiss or

[17] In testifying on S. 945 before the House Judiciary Committee, Senator Tydings similarly emphasized that "a district judge would retain ultimate responsibility for decision making in every instance in which a magistrate might exercise additional duties jurisdiction * * *." House Hearings on the Federal Magistrates Act, *supra*, at 73.

[18] The Senate report further stated that Section 636(b) "contemplates assignments to magistrates under circumstances where the ultimate decision of the case is reserved to the judge * * *" (S. Rep. No. 371, *supra*, at 26). But, that does not mean that the district courts were being given a free hand to assign to magistrates duties other than those typified in Section 636(b)(1)–(3) so long as the judge was at least nominally responsible for the ultimate decision. Rather, the statement indicated that in all cases covered by Section 636(b) the ultimate decision must be reserved to the judge unless "action can properly be taken by a nonarticle III judge." *Id.* at 26–27. In other words, that statement in the report addressed the allocation of responsibility concerning particular assignments to magistrates, not the delineation of areas in which magistrates could be assigned to assist judges.

for summary judgment.[19] The parties could file objections to the examiner's recommendation and were entitled to a hearing thereon before the district judge. See Rule 9(a)(4), (i), D. D.C. Civ. R. (as amended December 3, 1965).[20]

The narrow range of duties that Section 636(b)(2) permits the district courts to assign to magistrates is further shown by the fact that, where Congress intended magistrates to conduct a "preliminary review" on the merits and to submit "recommendations to facilitate the decision of the district judge having jurisdication over the case," it explicitly so provided. Section 636(b)(3) authorizes the district courts to empower magistrates to "preliminar[ily] review" applications for post-conviction relief and recommend

[19] Social security cases and others involving judicial review based on an administrative record are typically disposed of by motions to dismiss or for summary judgment.

[20] The examiner could entertain and make recommendation on the following motions: to place cases upon the Ready Calendar and objections thereto, and to remove a case from the Ready Calendar; to consolidate; to sever; for security for costs; to add additional parties; for leave to file third-party complaints; for leave to amend pleadings and to file amended complaints; for suspension, alteration or rescission by the court of orders granted by the clerk under Sections (1) and (2) of local Rule 10; to set aside default judgments; to vacate dismissals for want of prosecution; objecting to, seeking to enlarge or strike, and otherwise relating to interrogatories; to continue dates, or to change places for taking of depositions; for discovery and production of documents under Rule 34, Fed. R. Civ. P.; for physical examinations under Rule 35; and for substitution of counsel.

to the district judge whether there should be a hearing.[21] Even here, however, the magistrates' authority is extremely limited: he cannot recommend whether the application should be granted, but only whether there should be a hearing on it.[22] See *Wingo* v. *Wedding*, 418 U.S. 461, 470–473.

The Senate Committee report pointed out (S. Rep. No. 371, *supra*, at 26) that if the "district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, your committee believes that there will be increased time available to judges for the careful and unhurried performance of their vital and traditional

[21] If Section 636(b)(2) were broad enough to authorize General Order No. 104–D, then Section 636(b)(3) would seem superfluous. The counterpart of Section 636(b)(3) in the original bill (S. 3475) did grant distinct authority to magistrates since their authority under Section 636(b)(2) of that bill applied only to "pretrial discovery proceedings" (see pp. 16–17, *supra*). It is not likely that the addition of "or" between "pretrial" and "discovery" could have been intended by Congress, without discussion, to enlarge substantially the scope of Section 636(b)(2) so as to include all types of "pretrial" motions or proceedings. But see Doyle, *Implementing the Federal Magistrates Act*, 39 J. B. A. Kan. 25, 67 (1970).

[22] One witness suggested that the original bill (S. 3475) be amended to authorize magistrates, with the consent of the parties, to try certain kinds of civil cases, adding that "[t]o avoid any jurisdictional problem, the procedure might be cast in the form of a recommendation by the magistrate to the district court, which would confirm that recommendation as its own judgment." Senate Hearings on the Federal Magistrates Act, *supra*, at 235. There is no suggestion in the legislative history, however, that Congress intended to adopt this suggestion, which, while like General Order No. 104–D in providing for a recommended disposition on the merits by a magistrate, was significantly narrower in that it required the parties' consent.

adjudicatory duties * * *." One of those "vital and traditional adjudicatory duties" is the review of administrative decisions to determine whether they have "'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131. General Order No. 104–D, however, delegates that judicial function primarily to the magistrates. See *infra*, pp. 28–29.

The limitations upon the authority that Congress gave to magistrates, particularly with respect to rendering recommended or actual decisions,[23] reflected in part the legislative concern that granting those officials broader powers might raise constitutional problems involving the exercise of "the judicial power of the United States" by persons other than Article III judges.[24] See, *e.g.*, S. Rep. No. 371, *supra*, at 8, 25, 30–32, 36. See generally Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 780–789 (1975). Those limitations also reflect the somewhat experimental nature of this reform of judicial administration. Cf. S. Rep. No. 371, *supra*, at 26.[25]

[23] The Act gave magistrates limited jurisdiction to try certain "minor" offenses, but only with the parties' consent, followed by the right of appeal to the district court. 18 U.S.C. 3401; 28 U.S.C. 636(a)(3).

[24] Full-time magistrates are appointed for eight years, part-time magistrates for four years, and both can be removed on grounds in addition to misconduct. 28 U.S.C. 631(e), (h). Compare 28 U.S.C. 133.

[25] Moreover, the additional duties assignable under Section 636(b) were "intended to supplement, rather than supplant," the other statutory duties the Act imposed on magistrates, and it was "not anticipated that magistrates will be assigned additional duties under section 636(b) to such a degree that inter-

Whatever may be the validity of those congressional concerns,[26] the fact remains that in the Federal Magistrates Act Congress acted cautiously and permitted the district courts to authorize the newly-created officers to exercise only limited authority. As we now show, that authority does not include the preparation of recommended decisions in entire categories of cases that the district court has referred to them for that purpose on a routine basis and without regard to the complexity or particular problems of the individual case.[27]

ference with their specific statutory functions will result * * *." S. Rep. No. 371, *supra*, at 27.

[26] We do not contend that the Magistrates Act would violate Article III of the Constitution if it authorized courts to adopt rules like General Order No. 104–D. Cf. *Palmore* v. *United States*, 411 U.S. 389, 400–404, 407–410. We suggest only that Congress did not purport to exercise to the fullest extent its power over the federal courts. Compare, *e.g.*, *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 124–125.

[27] In the court of appeals the National Council of United States Magistrates argued as *amicus curiae* that the preparation by magistrates of recommended decisions may be analogized to the function that law clerks perform for some district judges (Br. 26). The relationship between a district judge and his law clerk, however, is significantly different from that between a magistrate and a district judge. A law clerk typically is selected and appointed by the judge (28 U.S.C. 752) and serves him normally for only one year under the judge's direct and close supervision. The relationship between the judge and law clerk is a unique one of confidence and confidentiality.

A full-time magistrate, on the other hand, is appointed for eight years by the majority of the judges of the district court (28 U.S.C. 631(a)), has no particular relationship with or allegiance to a specific judge, does not enjoy any confidential relation-

B. THE CHALLENGED DISTRICT COURT ORDER REQUIRES MAGISTRATES TO SERVE AS SPECIAL MASTERS, IN VIOLATION OF THE FEDERAL RULES OF CIVIL PROCEDURE (WHICH THE MAGISTRATES ACT MAKES APPLICABLE TO SUCH SERVICE), BECAUSE RULE 53 PERMITS SUCH REFERENCE ONLY IN EXCEPTIONAL CASES AND NOT ROUTINELY

The only provision in Section 636(b) that in terms might appear to authorize the district courts to refer all social security cases to magistrates to prepare recommended decisions is the authorization of magistrates to serve "as a special master in an appropriate civil action, pursuant to * * * the Federal Rules of Civil Procedure for the United States district courts." 28 U.S.C. 636(b)(1). In preparing such recommended decisions, the magistrates would perform the same functions as special masters. The reference of those cases to magistrates as special masters would violate Rule 53 of the Federal Rules of Civil Procedure, because that rule permits references to special masters only in exceptional cases and not routinely. Moreover, Congress did not intend to permit the district courts, by acting under the general language of the statute permitting them to assign to magistrates "additional duties * * * not inconsistent with the Constitution and laws of the United States," to avoid the limitations of Rule 53 and make the very type of references

ship with him and, indeed, functions as an independent officer. There is no reason to believe that, in creating the office of magistrate, Congress intended those officers to perform the same functions and have the same authority as a judge's law clerk.

to magistrates that the rule would not permit to special masters.

1. The magistrate's role in a social security case "referred" pursuant to General Order No. 104–D is essentially that of a special master appointed in such a case pursuant to Rule 53. Like a special master, a magistrate receives briefs and hears argument, submits an initial report to the parties and, after considering their comments, submits a recommended decision on the legal issues raised by the complaint. The district court may accept or reject that recommendation, and need not accord it any special deference. General Order No. 104–D (Pet. App. E, pp. 13A–14A); Fed. R. Civ. P. 53(c), (e)(1), (2), (5).[28]

2. Rule 53(b) provides that:

> * * * reference to a master shall be the exception and not the rule. * * * [I]n actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

In authorizing magistrates to serve as special masters, the Magistrates Act intended to continue those limitations. See *United States* v. *Eastmount Shipping Corp.*, 62 F.R.D. 437, 440–441 (S.D. N.Y.).

[28] A special master is authorized to hear evidence and make findings of fact, which the court in a non-jury trial "shall accept * * * unless clearly erroneous." Fed. R. Civ. P. 53(c), (e)(1), (2). Although General Order No. 104–D also provides for fact findings by magistrates, it does not explicitly require the court to accept them. However, because of the limited scope of judicial review in social security cases, the fact-finding functions of magistrates are not directly in issue in this case, as the court of appeals acknowledged (see p. 7, *supra*, n. 9).

Unlike the earlier bills (which did not include the limitation), Section 636(b)(1) provides that a magistrate may serve as a special master only in accordance with the Federal Rules of Civil Procedure. In explaining this requirement, added in response to criticism by the Judicial Conference (see p. 17, *supra*),[29] the Senate Report stated (S. Rep. No. 371, *supra*, at 25):

> [i]n particular, rule 53(b) provides that a reference to a master shall be the exception and not the rule; that in actions tried by a jury a reference shall be made only when the issues are complicated; and that in actions tried without a jury, save in matters of account, a reference shall be made only upon a showing that exceptional circumstances require it. These conditions, which in essence reflect the rule laid down by the Supreme Court in *LaBuy v. Howes Leather Company*, 352 U.S. 249 (1957), protect against any abdication of the decision-making responsibility that is properly that of the district courts. A memorandum * * * prepared by the staff of the Subcommittee on Improvements in Judicial Machinery * * * pro-

[29] The Judicial Conference approved the revised version of Section 636(b)(1) "subject to the qualifications expressed in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, and also subject to the observation that its approval is not to be construed to modify or extend the present rules on the use of special masters. * * * [T]hese qualifications could be satisfactorily met by incorporation of a reference to the *La Buy* rule in the report of the Congressional committee" (Senate Hearings on the Federal Magistrates Act, *supra*, at 244).

vides an analysis of rules relevant to the assignment of magistrates as masters.[30]

Thus, service of magistrates as special masters is subject to the overriding principle, reiterated in *La Buy,* that civil cases should "seldom" be referred to a master, "'and if at all only when unusual circumstances exist,'" because "'[l]itigants are entitled to a trial by the court, in every suit * * *.'" 352 U.S. at 258.

Moreover, these limitations on references to masters are to be strictly applied. For example, docket "congestion in itself is not such an exceptional circumstance as to warrant reference to a master" (*id.* at 259). The practice of referring a particular category of civil cases to a master, without regard to the circumstance of the individual case, is improper because "what time there is of the court, in view of the whole docket, must be equitably distributed." *Los Angeles Brush Mfg. Corp.* v. *James,* 272 U.S. 701, 708.[31]

[30] The staff memorandum noted three "fundamental reasons for restricting the use of special masters": (1) the resulting "abdication of the judicial power which is reserved in the judiciary by the Constitution;" (2) infringement upon "a litigant's right to have his case tried before a judge and/or a jury;" and (3) "increased cost which references invariably cause." Senate Hearings on the Federal Magistrates Act, *supra,* at 281–282. The staff study added that "the practice of systematically referring particular types of cases to a master violates * * * [the] fundamental principle [that reference to a master should be the exception and] * * * has been uniformly prohibited." *Id.* at 282.

[31] In *Los Angeles Brush* the Court observed that if it found that the rules of procedure limiting references to masters "have been practically nullified by a district judge, or by a concert of action on the part of several district judges, it would not hesitate to restrain them." 272 U.S. at 707.

As the Sixth Circuit stated in *Ingram* v. *Richardson,* 471 F. 2d 1268, 1271–1272, in ruling that "[i]t was error" for the district court to refer a social security case to a magistrate to prepare a recommended decision, there is "no good reason why * * * [social security] cases should be shunted in favor of other civil actions." See also *McCullough* v. *Cosgrave,* 309 U.S. 634;[32] *La Buy* v. *Howes Leather Co., supra,* 352 U.S. at 266 (Brennan, J., dissenting).

3. The blanket reference of all social security cases to magistrates serving as special masters to prepare recommended decisions would not be permissible under Section 636(b)(1), because such service would not be in conformity with Rule 53. The remaining question is whether the Magistrates Act nevertheless permits the district courts to do indirectly what they could not do directly by similarly referring these cases to magistrates without designating those officers as special masters.

In light of the care Congress took to insure that references to magistrates as special masters be limited to exceptional cases, the legislature certainly did not

[32] It is of historical interest that the Central District of California, whose extensive delegation of powers to magistrates is before the Court in this case, constituted until 1966 the major geographical area of the Southern District of California (see 28 U.S.C. 84(c), (d); 80 Stat. 75–76), the district whose practices in referring cases to masters were before the Court in *Los Angeles Brush* and *McCullough.* At the time of the references in those cases, the Southern District had two and seven judges, respectively; now the Central and Southern Districts have sixteen and five judges, respectively, for a total of 21 in what was previously the Southern District. See 28 U.S.C. (1940 ed.) 1 note; 28 U.S.C. 133.

intend to sanction the automatic reference of entire categories of cases to magistrates to perform the same functions they could perform as special masters only in extremely limited circumstances based upon the exceptional nature of the individual case. There would have been no reason for the limitations Congress provided upon the use of magistrates as special masters if those limitations could be avoided by changing the form in which cases were referred to magistrates to prepare a recommended decision. The additional duties that Congress specifically authorized the district courts to assign to magistrates were "intended to illustrate the general character of duties assignable to magistrates under the act * * *." S. Rep. No. 371, *supra,* at 25; H.R. Rep. No. 1629, *supra,* at 19. The district courts' authority to assign to magistrates additional duties "not inconsistent with the Constitution and laws of the United States" (28 U.S.C. 636(b)) must be interpreted in the light of the underlying congressional purpose to give magistrates only limited authority to perform relatively minor functions that are ancillary to the judicial function of adjudicating cases.

The fact that the magistrate renders only a recommended decision, which the district court may accept or reject, does not justify the blanket reference of all social security cases to magistrates. In practice, the district courts rarely reject the magistrate's recommended decision. For example, our review of all social security cases referred to magistrates in the fiscal year 1974 in the Central District of California and in the

Northern District of Georgia, which has a similar rule, revealed that in none did the court reject the magistrate's recommended decision (Pet. 7, n. 10).

The infrequency of reversal of magistrates' recommended decisions is hardly surprising, since most social security cases involve the question whether the Secretary's findings are supported by substantial evidence. Once the magistrates have reviewed the administrative record, which may be lengthy, and rendered a recommended decision on that issue, busy district court judges are understandably reluctant to recanvass in detail the same ground. As the Court of Appeals for the Seventh Circuit has recognized with respect to the analogous relationship between the district judge and a master, "[w]hen a master is appointed, 'you do not get the judge, you get the judicial determination of the master.'" *TPO, Inc.* v. *McMillen, supra,* 460 F. 2d at 356, n 50.[23]

C. THE EFFECTS UPON JUDICIAL ADMINISTRATION OF REFERENCE OF ALL SOCIAL SECURITY CASES TO MAGISTRATES DO NOT JUSTIFY GENERAL ORDER NO. 104–D, BUT ARE MATTERS FOR CONGRESS TO CONSIDER

The number of social security cases in the district courts is substantial and is increasing. The Depart-

[23] One experienced district judge has said that he "cannot think of any ministerial area where a master could take over, where it does not result in adjudication." Senate Hearings on the Federal Magistrates Act, *supra,* at 69. See also *Rainha* v. *Cassidy,* 454 F. 2d 207, 208 (C.A. 1), expressing concern about a district judge's approval of a magistrate's decision by "a pro forma laying on of the hands * * *."

ment of Health, Education, and Welfare ("HEW") has advised that more than 2,500 of these cases were filed in 1973 and more than 4,000 in 1974, and that based on the level of current filings and administrative hearings, approximately 7,000 cases will be filed this year and about 11,000 in 1976. HEW estimates that the question of disability is an issue in at least ninety percent of those cases.[34] HEW also advises that thirteen district courts generally refer social security cases to magistrates,[35] and one is considering a recommendation to do so.[36] In addition, other district courts refer such cases to magistrates on a more selective basis, so that in fiscal 1974 magistrates prepared recommended decisions in at least some social security cases in 26 of the 91 district courts covered by the Magistrates Act.[37]

[34] The figures for disability cases cover three categories: (1) social security disability cases, (2) cases under the Supplemental Security Income Program (42 U.S.C. (Supp. III) 1381, *et seq.*), pursuant to which since January 1974 the federal government has made direct payments to blind, disabled and aged persons who are needy, and (3) cases under the "black lung" disability program for miners. 30 U.S.C. (Supp. III) 901, *et seq.*

[35] Those districts are: Connecticut; New Jersey; the Western, Middle and Eastern Districts of Pennsylvania; the Northern District of West Virginia; the Northern District of Georgia; Minnesota (where two out of four judges make references); the Eastern District of Oklahoma (where two out of three judges make references); the Eastern District of Missouri; the Central District of California; the Western District of Washington; and Oregon.

[36] The Western District of Wisconsin.

[37] Annual Report of the Director, Administrative Office of the United States Courts, pp. A–102, A–103, table M4 (1974). The Act does not apply to the district courts in the Canal Zone, Guam, and the Virgin Islands.

It is impossible to determine whether and to what extent the use of magistrates to prepare recommended decisions in all social security cases would significantly lighten the burdens of district courts in handling these cases and accelerate their decision. The district courts that utilize this procedure obviously believe that it is advantageous or at least that it appears sufficiently meritorious to warrant trying it.[38] Only about fourteen percent of the total number of district courts (thirteen out of 91), however, routinely use the procedure in social security cases; whether a substantially larger number would do so if the Court upheld it cannot be predicted.

Any procedure that will expedite the handling of a substantial number of cases in the federal court is highly desirable. As a matter of policy, therefore, there apparently is much to be said for the use of magistrates that General Order No. 104–D sanctions.[39]

[38] On the other hand, because the procedure involves two tiers of review—first the magistrate, and then the district court—it may entail additional expenses and delays for the litigants. Although HEW advises that at present social security cases referred to magistrates generally require somewhat less time for final decision at the district court level than cases not so referred, it cannot be foretold whether this pattern would continue if there were a much wider use of magistrates to perform this and other functions.

[39] General Order No. 104–D apparently has the support of the Judicial Conference Committee to Implement the Federal Magistrates Act. In 1970 that Committee, on the basis of then very limited experience with the use of magistrates, included review of social security cases and of other administrative actions in a "checklist" of functions that courts might consider

Our difficulty with that use, however, as set forth in the preceding portions of this brief, is that the language, statutory scheme, and legislative history of the Magistrates Act indicate that Congress intended a much more limited role for magistrates than General Order No. 104–D mandates. The use of magistrates to prepare recommended decisions in substantial categories of cases involving district court review of the decisions of administrative agencies would constitute a far-reaching change in the manner in which the district courts hitherto have conducted this important segment of litigation. Perhaps the time is ripe for such a change. Before it is made, however, we believe that Congress should focus specifically upon the issue and define more precisely than it has done in the Magistrates Act the functions that magistrates may perform in handling these cases.

Congress did not consider this particular problem in enacting the Magistrates Act. Moreover, it may

authorizing magistrates to perform and which the Administrative Office of the United States Courts circulated to all district courts. Hearings on United States Magistrates before Subcommittee No. 4. of the House Committee on the Judiciary. 92d Cong., 1st Sess. 26–31 (1971). The Committee cited no provision of the Act and provided no analysis supporting its view of the expansive scope of authority that may properly be assigned to magistrates—a view that contrasts with the more limited position the Judicial Conference itself expressed during congressional consideration of the Magistrates Act (see pp. 17, 25, *supra*). Indeed, the Judicial Conference opposed a listing of specific "additional duties" in Section 636(b), preferring instead that courts assign duties to magistrates "on a case-by-case basis under such limitations as the court may deem necessary or appropriate." Senate Hearings on the Federal Magistrates Act, *supra*, at 241n.

be that not all cases involving review of administrative decisions should be treated alike. Perhaps magistrates may be appropriately used to prepare recommended decisions in social security cases (or some types thereof) but not in other categories of cases, such as civil rights cases. These are issues that Congress should explore in depth before deciding to expand significantly the authority of magistrates beyond that which they have under the present statute.

In short, the advantages for the district courts of permitting magistrates to prepare recommended decisions in broad categories of cases is a matter for Congress to resolve after a thorough consideration of all facets of the problem. It is, however, not a basis for an expansive reading of what we believe to be the limited authority Congress conferred upon the magistrates in the Magistrates Act.[40]

[40] Because the question presented is one of statutory construction primarily concerning judicial administration, having no probable effect upon the reliability of the proceedings, it would be appropriate that a decision reversing the court of appeals' judgment be prospective, at least in the sense that it would not invalidate judgments or proceedings involving past references of cases to magistrates in which a timely objection to the reference was not made and preserved. Cf. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105–107.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-850

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Petitioner,

v.

WILLIAM G. WEBER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-850

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Petitioner,

v.

WILLIAM G. WEBER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

I.

POSITION OF AMICUS CURIAE

Petitioner, the Secretary of Health, Education, and Welfare, sought and obtained from this Court a writ of certiorari to review a judgment of the Court of Appeals affirming the denial of his motion in the District Court

to vacate the Court's reference to a U.S. Magistrate of Respondent's[1] complaint under the Social Security Act. Respondent neither opposed nor supported Petitioner's motion in the District Court. He did not participate in the interlocutory appeal from the District Court's denial of Petitioner's motion. He filed no opposition to the petition for certiorari. He has, in fact, written a letter to this Court expressly disclaiming any desire to participate in the consideration of the issues Petitioner seeks to have reviewed. (A copy of the letter is included in Appendix A to this brief). Accordingly, this Court, by its order of May 27, 1975, appointed the undersigned as *amicus curiae* and invited the submission of a brief and participation in oral argument in support of the judgment below.

Amicus thus finds lurking at the threshold of this case the issue whether, under Article III of the Constitution, there is a "case or controversy" properly before this Court. It is *amicus'* view that the issues presented do meet the constitutional justiciability standard and, even though one of the parties has declined an active role in these proceedings, the Court nonetheless has the power to determine the issues presented.

The instant struggle is actually between the Department of Justice and the federal District Judges in those

[1] William G. Weber was the plaintiff in a suit seeking judicial review of defendant's denial of benefits under the Medicare provisions of the Social Security Act. Weber has not participated in those aspects of the case with which this Court is now concerned and has, therefore, filed no appearance here. Solely for the sake of convenience, he will be referred to herein as "Respondent" as Petitioner has done in his brief. (*See, e.g.*, Pet. Br. at 2).

districts where local rules have been adopted similar to the one under which Respondent's case was referred to a magistrate.[2]

Petitioner has become the spokesman for the Justice Department's views. Respondent Weber is a hapless bystander. But notwithstanding Respondent's election to stand aside, he has a real dispute with Petitioner on the merits of his complaint and would appear to have an "interest" in a prompt determination of the forum in which he is to have his "day in court."

Petitioner might more properly have sought to test the propriety of the District Court's action by seeking a writ of mandamus directing the Court to vacate its order of reference. In that posture, none would deny that a "case or controversy" was validly before this Court. In *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (a decision discussed in other contexts in some detail in the briefs of both Petitioner and *amicus*), a District Judge's reference of two antitrust cases to a master appointed pursuant to Rule 53, Fed. R. Civ. P., over the opposition of all the parties to the suit, was reviewed here when the litigants obtained a writ of mandamus from the Court of Appeals directing the Judge to vacate his order of reference. In mandamus cases, the Judge's ruling under challenge is normally supported by at least one of the parties to the suit and the Judge is, accordingly, represented by counsel for

[2] The Magistrates Division of the Administrative Office of the United States Courts advises that in at least 30 districts the court rules authorize magistrates to handle social security benefits cases.

the real party in interest.[3] Stern & Gressman, Supreme Court Practice 426 (4th ed. 1969). In *La Buy*, where all the parties opposed his ruling, the Judge was represented by counsel he appointed for this purpose. *Id.* n.12. A comparable procedure might have been followed here.

Nonetheless, even in the somewhat unusual posture of the present case in this Court, the policy considerations underlying the concepts of "case or controversy" in the sense of Article III still appear to obtain. There is nothing "abstract, feigned or hypothetical" about either the dispute between Respondent and Petitioner, or the dispute between the District Judges and Petitioner. *Sibron v. New York*, 392 U.S. 40, 57 (1968). There is a virtual certainty that the dispute between Petitioner and the District Judges will recur frequently, *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515-16 (1911). and, given the large – and growing – number of potential impecunious claimants like Respondent, there is a poignant and recurrent public interest in clarifying the proper scope of the authority of magistrates in reviewing decisions of the Social Security Administration. See *Richardson v. Ramirez*, 418 U.S. 24, 41 n.13 (1974) (necessity for clarifying duties of officials permits consideration of the case "at least [as] a

[3]This can include the United States Attorney when the decision is favorable to the Government's position. In the context of an attempt to challenge a reference to a magistrate which the government *supported*, the U.S. Attorney served as counsel to the Court to which the writ of mandamus was to be directed. *See Campbell v. U.S. District Court*, 501 F.2d 196, 197 (9th Cir. 1974).

declaratory judgment" subject to Supreme Court review.) Furthermore, there has been and will continue to be ample presentation of adversarial positions in the proceedings to assure this Court that the relevant issues are being thoroughly presented and contested. The National Council of United States Magistrates, albeit nominally as *amicus curiae*, filed a lengthy brief below in support of the District Court's reference. Petitioner's pleadings in this Court and below are certainly adequate to illuminate the issues. And, in accordance with this Court's order, *amicus* is filing this brief in support of the judgment below. The failure of the prevailing interest in a lower court decision to oppose a petition for certiorari or to appear before this Court has not been considered a basis for depriving this Court of the power to determine the justiciable issues presented by a proper petition. See 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, §§3529-30 (1975). Similarly, Respondent's unwillingness to participate in this case should not be viewed as preventing the matter from being regarded as a "case or controversy" in the constitutional – and thus jurisdictional – sense. Cf. *Utah Public Service Commission v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969) (decision on the merits despite motions by appellant and all appellees to dismiss the appeal). Accordingly, *amicus* believes this case is properly before the Court and should be decided.

II.

QUESTION PRESENTED

May a United States District Court properly adopt a rule referring to a United States Magistrate appointed by that Court any case filed seeking judicial review of certain types of executive agency action (such as the denial of benefits claimed under the Social Security Act) for an initial review of the record made in the executive agency and for the preparation of a report and a recommended disposition that is submitted to a District Judge for his consideration in rendering the judgment of the Court.

III.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case and his recital of the relevant statutes and rules. *Amicus* also agrees that jurisdiction properly rests on 28 U.S.C. §1254(1), subject to the views expressed in Part I, above.

IV.

SUMMARY OF ARGUMENT

The Federal Magistrates Act authorizes the District Courts to adopt rules under which United States Magistrates may be assigned a variety of duties to

enable the courts better to exercise their judicial functions. The legislative history, logic and language of the law support the judgment of the Court below affirming the denial of a challenge to such a rule in the context of a case seeking judicial review of a decision of the Petitioner Secretary of Health, Education, and Welfare refusing benefits claimed under the Social Security Act.

A. Neither the Constitution nor otherwise applicable law prevents a District Court from adopting the practice contemplated by the Federal Magistrates Act by which certain types of matters, likely to be time consuming but relatively routine, are as a matter of court rule referred to a magistrate for initial review and the preparation of a recommended disposition.

B. Under the General Order of the District Court applicable to this case, the magistrate reviewing the record made in the executive agency does not serve as a "special master" within the meaning of Rule 53, Fed. R. Civ. P. Therefore, neither the express language of that Rule nor its judicial gloss apply to the facts before the Court.

C. In enacting the Federal Magistrates Act Congress encouraged the courts to adopt innovative procedures for utilizing a new type of judicial officer. The instant case would appear to illustrate precisely the type of situation in which magistrates could be used effectively. Limited experience to date has demonstrated that the use of magistrates can at least reduce the time needed for disposing of such matters. Thus, it seems both unnecessary and premature to require Congress to reconsider the Act. This Court can and should expressly sanction a procedure adopted by many of the most active and respected District Courts.

V.

ARGUMENT

This should not be a difficult case. It concerns an Act of Congress, consciously enacted after extended consideration, to relieve the indisputably enormous work load of the District Courts. Its language may not be a model of precision and clarity; few Acts of Congress are. But no open-minded reading of its text or legislative history should leave any doubt about its intended meaning – or the correctness of the judgment below in applying it. Simply put, it is the view of *amicus* that United States Magistrates were created to serve as "para-judicial" officers of the courts, to assist, not substitute for, the District Judges in the discharge of the judicial power of the United States. Petitioner has conceded the concept is not constitutionally infirm. Some lower courts have nevertheless expressed in dictum possible constitutional reservations. And the Department of Justice has curiously adopted a policy requiring United States Attorneys to press a highly restrictive interpretation of the Act on the courts, a policy that seems explicable only in terms of constitutional doubts. Accordingly, *amicus* has felt it necessary and appropriate briefly to discuss the constitutional questions. However, in *amicus'* view, as conceived by Congress and as applied in this case, the Magistrates Act should pass constitutional muster and be given the generous, wholly appropriate, interpretation applied by the Court of Appeals.

A. Neither the Constitution nor other applicable law prevents a United States District Court from adopting a rule such as General Order No. 104-D.

1. The constitutional considerations.

Petitioner has expressly denied that this case presents a constitutional question; he suggests it involves solely a matter of statutory interpretation. (Pet. Br. at 22 n.26.) *Amicus* believes, nevertheless, that Petitioner's position is explicable solely in terms of his (or the Department of Justice's) feeling that the broader interpretation given the Federal Magistrate's Act by most of the lower courts might offend Article III. Cf. Pet. Br. at 18 n.18. Petitioner concedes that the expedition of cases is "highly desirable," that references to magistrates of certain types of cases could help to achieve this goal, and that there is, therefore, much to be said in favor of the policy underlying General Order No. 104-D. (Pet. Br. at 31) Yet, the Government has adopted a regulation directing every United States Attorney to oppose the reference to a magistrate of any case if the reference "would be in contravention of the Constitution or Rule 53(b)." 28 C.F.R. §50.11(c) (1973). The Petitioner's motion to vacate the reference of this case is, thus, presumably based upon the Government's view that the reference is unconstitutional; otherwise it should not have moved to vacate, since this case does not involve a utilization (or interpretation) of Rule 53, Fed. R. Civ. P. These considerations prompt *amicus* to discuss, at the outset and in admittedly cursory form, the reasons why he believes utilization of the Federal Magistrates Act as broadly as the Congress intended and

the lower courts have applied it raises no constitutional problem.[4] These considerations similarly prompt *amicus* to urge the Court to lay to rest the Government's constitutional concerns by addressing them in this case.

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[4]More extended discussion of the "perceived tension" between the Magistrates Act and Article III may be found in an excellent law review article reaching the same conclusions as *amicus*: Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 780-89 (1975). The tensions perceived by some of the Courts of Appeals seem to *amicus* to reflect less the result of a studied examination of the constitutional problem than a visceral antagonism to any denigration of the decision-making process of Article III judges. Further, none of those cases involved situations in which a magistrate was ordered only to review an agency record. *Ellis v. Buckhoe*, 491 F.2d 716, 717 (6th Cir. 1974) (habeas corpus hearing); *TPO, Inc. v. McMillen*, 460 F.2d 348, 352-54, 259 (7th Cir. 1972) (motion for summary judgment); *Reed v. Board of Election Comm'rs*, 459 F.2d 121, 123 (1st Cir. 1972) (preliminary injunction hearing). For decisions perceiving no such tensions *see Cruz v. Hauck*, 515 F.2d 322, 326-28 (5th Cir. 1975) (civil rights case, but expressly considered outside scope of the Magistrate's Act and governed solely by Rule 53); *DeCosta v. Columbia Broadcasting System, Inc.*, 383 F.Supp. 326, 332-34 (D.R.I. 1974) *rev'd on other grounds*, ____ F.2d ____ (1st Cir. 1975) (236 PTCJ A-J, July 17, 1975) (consensual reference for full adjudication); *Yascavage v. Weinberger*, 379 F.Supp. 1297, 1302-03 (M.D. Pa. 1974) (Social Security Act review, comparable to the instant case). The only Court of Appeals decision invalidating a reference in an agency review case – indeed, a Social Security Act case – does not mention the constitutional issue but is based solely on what *amicus* regards as an erroneous construction of the Magistrates Act. *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972).

a. The judicial power of the United States under Article III.

Article III of the Constitution declares that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This judicial power extends to the cases enumerated in Section 2 of Article III. Other than the Supreme Court, the federal courts are congressional creations; whose jurisdiction is subject to congressional definition. In fact, the federal courts have been reshaped and reorganized several times since 1789, and changes in the laws regulating the federal judiciary in some measure are introduced at every session of Congress. This Court has sanctioned congressional specification of a particular court for deciding certain types of cases or questions to the exclusion of all other federal courts,[5] or to grant

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[5]*See Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (challenge to war-time price controls properly reserved to Emergency Court of Appeals). The Court of Claims has exclusive jurisdiction over claims against the United States for money damages under the Tucker Act which exceed $10,000. 28 U.S.C. §§1346(a) (2), 1491. Patent infringement suits against the United States, likewise must be filed in the Court of Claims. 28 U.S.C. §1498. Suits challenging tax assessments are exclusively heard by the Tax Court, 26 U.S.C. §6213(a), while refund claims may be heard in the District Court or the Court of Claims. 28 U.S.C. §1346. Suits challenging the assessment of customs duties are exclusively heard in Customs Courts. 28 U.S.C. §1582.

particular types of remedies.[6] And while Article III states that the judicial power of the United States "shall" be vested in the Supreme Court and inferior federal courts, at no time has the entire constitutional power under Article III been conferred upon any federal court. No "federal question" jurisdiction existed until 1875;[7] and Congress has consistently imposed a jurisdictional monetary amount on diversity cases.[8]

b. Other bases of federal judicial power.

While Article III defines the "judicial power" of the United States, federally-created courts have also been granted jurisdiction by the Congress under other articles of the Constitution. As long ago as 1828, this Court held that a territorial court, whose judges did not "enjoy life tenure or undiminished salary protection," could adjudicate an admiralty dispute – clearly a case falling within the purview of Article III.[9] And as

[6] *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938) (injunction in a labor dispute may not be granted absent prescribed findings). Review of Patent Office Board decisions on the record alone is vested in the Court of Customs and Patent Appeals, 35 U.S.C. § 141, while if additional evidence is to be introduced, actions to compel the issuance of a patent in the District Courts are permitted. 35 U.S.C. § § 145, 146.

[7] 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3561, at 389 (1975); Act of March 3, 1875, 18 Stat. 470.

[8] 28 U.S.C. § 1332. *See also Cary v. Curtis*, 3 How. 236, 245 (1845); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511 (1898); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922).

[9] *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511 (1828).

recently as 1973, the Court reaffirmed Congress' power to establish courts that dispose of cases or controversies that would be within the judicial power of the United States if they arose in the states. In *Palmore v. United States*, 411 U.S. 389 (1973), congressional power to create a non-Article III court for the District of Columbia was sustained. The Court explicitly rejected the argument that trial and decision of all federal questions were reserved for Article III judges. Congress has also established "legislative courts" to decide a wide variety of other federal questions, relating to such matters as military discipline,[10] and taxation.[11]

Of perhaps more immediate significance to the instant case, Congress has created a host of administrative agency boards in the executive branch to decide controversies arising under federal law, subject to limited appeal in the "constitutional courts" established under Article III. As the Court said in *Crowell v. Benson*, 285 U.S. 22, 51 (1932) "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." In approving a statutory scheme limiting judicial review of most finding of fact made by an administrative official to considerations of whether they are supported by evidence, the Court in *Crowell* established the authority of administrative agencies to conduct adjudicatory proceedings and to make conclusive fact

[10] 10 U.S.C. § 867. *See, e.g., O'Callahan v. Parker*, 395 U.S. 258, 265 (1969).

[11] 26 U.S.C. § § 7441, 7443.

determinations in controversies otherwise falling within Article III concepts.

c. The need for an Article III judge to decide controversies.

Article III specifies that judges "both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Although other attributes have been engrafted by the courts, the tenure and undiminished compensation safeguards are regarded as the most significant, rooted in the Framers' desires to fulfill the aim of the Declaration of Independence that the Executive be prevented from making "[j]udges dependent on his Will alone, for the tenure of their offices, and the amount of payment of their offices."

A wide variety of cases arising within the Article III federal judicial power have traditionally either been heard in the first instance or decided by officers who do not enjoy the constitutional protections of secure tenure and undiminished compensation. State courts have exclusive jurisdiction to determine various cases arising under the Constitution and laws of the United States.[12] Federal "legislative courts" and administrative

[12] *E.g.*, Federal question cases failing to meet the statutory minimums in suits brought under 28 U.S.C. § 1331(a) (the general "federal question" jurisdictional statute) must be brought in non-federal forums. *See* 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3561 (1975).

agencies in the executive branch, too, have been assigned fact-finding and decision-making functions by the Congress in many specialized areas of federal law – including areas historically subject to common law adjudication.

The Article III federal courts themselves, moreover, have traditionally assigned a portion of their judicial power to subordinate officers such as special masters, commissioners and auditors. Referees in bankruptcy, appointed for fixed terms of years and even exercising the adjudicatory functions of a bankruptcy court, can be closely analogized to the magistrates more recently authorized. This authority to delegate duties has its origins deep in English equity practice and has been generally accepted as inherent in a court, as long as the court reserves to itself the final adjudication of the merits of the litigation. Delegation of a wide range of functions is sanctioned by 200 years of American practice and, under limited circumstances, by the Federal Rules of Civil Procedure.[13] The United States Court of Claims, too, has delegated virtually its entire trial responsibility to trial commissioners who are not constitutional judicial officers.[14]

In *Ex Parte Peterson*, 253 U.S. 300, 312 (1920), this Court noted that

> "Courts have (at least, in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . . This power includes authority to appoint persons unconnected with the court to aid judges in the

[13] Rule 53, Fed. R. Civ. P.

[14] 28 U.S.C. § 2503; Rule 52, Ct. Cl. Rules.

performance of specific judicial duties, as they may arise in the progress of a cause."

The parenthetical limitation in the *Peterson* formula has been applied by this Court – once within the context of a reference to a magistrate – and deserves further elucidation. In *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), the Court deplored the "abdication" of an Article III district judge in favor of a special master. But the Court made clear that it was interpreting Rule 53 of the Federal Rules of Civil Procedure in finding that none of the "exceptional conditions" mandated by the Rule as a basis for a reference existed in the case before it; on the contrary, every recited circumstance pointed in the direction of retention of the matter by the Court. The Constitution is not mentioned or cited once in the entire opinion. And in *Wingo v. Wedding*, 418 U.S. 461 (1974), the Court held that the language of the Habeas Corpus Act, 28 U.S.C. §2243, as previously interpreted, required a District Judge personally to conduct evidentiary hearings in habeas corpus actions, notwithstanding some contrary indications in the later-enacted Federal Magistrates Act. The Court expressly stated that it was not required to resolve the question "whether Congress constitutionally may enact legislation vesting authority, pursuant to rule or order of court, in magistrates to hold evidentiary hearings on habeas corpus petitions. We indicate no views as to the validity of investing such authority in a magistrate . . . 'outside the pale of Article III of the Constitution.' " 418 U.S. at 467 n.4. (Quaere whether the comment that a magistrate is "outside the pale of Article III" was intended to suggest a problem with his participation in a case not governed by specific

statutory language such as the Habeas Corpus Act. Cf. the dissenting opinion of The Chief Justice and Mr. Justice White, 418 U.S. at 474.)

The cited footnote in the majority opinion of *Wedding* notwithstanding, it seems clear from the pertinent decisional law that as a constitutional proposition Congress could confer – or permit the courts to confer – substantial duties on United States Magistrates. There may be certain circumstances in which the Constitution would require an Article III judge alone to act, but no such circumstances have been defined in the law to date. Those decisions which have restricted the delegation of judicial functions to United States Magistrates and other non-Article III judges have all been grounded on policy considerations and statutory interpretation, rather than constitutional strictures, although constitutional problems have been superficially perceived and mentioned. In *amicus'* judgment, if there is a constitutional limit on the authority of Congress to authorize non-constitutional judicial officers to hear or adjudicate Article III federal questions, it would probably lie in the area of due process requirements in criminal cases.[15] But this case is not a criminal case nor even, as a habeas corpus proceeding might be regarded, ancillary to a criminal prosecution. This is a case that can and should be decided free of constitutional clouds.

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[15] *See* Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?* 36 Geo. Wash. L. Rev. 273, 291-93 (1967); Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 Va. L. Rev. 697 (1974).

2. Acts of Congress

If the Constitution does not bar the adoption of General Order No. 104-D, no other statute or its equivalent (such as Rule 53, Fed. R. Civ. P.) would appear to do so. This is not a case, such as *Wingo v. Wedding*, in which the Court is called upon to reconcile possibly conflicting statutory texts applicable to a single proceeding. Although Petitioner argued below that the reference of this case to a magistrate was "inconsistent" with the scheme of judicial review envisaged by the Social Security Act, he has expressly denied reliance on that position here. (Pet. Br. at 12 n. 11.) The relevant statutory materials are, thus, exclusively the Federal Magistrates Act and Rule 53.

a. The Federal Magistrates Act.

The Federal Magistrates Act was the product of careful preparatory work by the Judicial Conference of the United States and the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee under the Chairmanship of Senator Tydings. It was the subject of hearings in three sessions of the Congress and underwent substantial revision in the light of comments received from judges, scholars and members of Congress. Its extensive legislative history reflects concern about adherence to the traditional values underlying Article III. But it also reflects a desire and willingness to encourage new approaches for enabling the District Courts to perform their historic judicial functions.

The paramount purpose of the Federal Magistrates Act, as described on the floor of Congress by the managers of the bill, was "to clear congestion in the court dockets," 114 Cong. Rec. 28364 (1968) (remarks of Congressman Poff), by "establish[ing] a system capable of increasing the overall efficiency of the Federal judiciary." 114 Cong. Rec. 29407 (1968) (remarks of Senator Tydings). Both houses of Congress made it clear that this stated goal could be achieved by "cull[ing] from the over-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers." S. Rep. No. 371, 90th Cong., 1st Sess. 9 (1967); H.R. Rep. No. 1629, 90th Cong., 2d Sess. 12 (1968).

In adopting the Magistrates Act, Congress consciously failed to provide an all inclusive list of those "matters that are more desirably performed by" United States Magistrates. It wanted to afford the District Courts maximal room to experiment with the utilization of magistrates and to tailor their employment to the particular problems and requirements of the given court. Senator Tydings, testifying before the House Judiciary Committee, stressed this point:

> "We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas [specified in § 636(b)] and perhaps even come up with new areas to increase the efficiency of their courts."

Hearings on the Federal Magistrates Act before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess. 81 (1968). Similarly, the Senate Committee Report concluded that if

> "district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts . . . there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts."

S. Rep. No. 371, *supra*, at 26.

The Magistrates Act envisioned three principal duties for the new tier of judicial officers being established:

First, magistrates were to be invested with the *authority to decide* in cases involving "minor offenses" against the United States and in which both parties consented to such a trial. 18 U.S.C. § 3401. The statute thus increased the maximum penalties that could be imposed by other than a District Judge. And by transforming the pre-existing office of United States Commissioner, a court official who had been paid on a per-case basis and who had often performed his duties as part-time employment, into a magistrate salaried, and often full-time, the Congress thought it could and would elevate both the quality of the personnel performing this adjudicatory role and the quality of the justice being dispensed in the name of the United States. Although the authority of magistrates to decide minor offense cases is not at issue here, it is relevant in demonstrating that Congress clearly – perhaps even as a matter of paramount interest – intended these newly created officers of the courts to exercise a true judicial function (albeit in a limited class of cases).

Second, magistrates would be *available to act as masters*, subject to the rules, notably Rule 53, Fed. R. Civ. P., applicable to all masters appointed by the

courts. 28 U.S.C. § 636(b)(1). The legislative history is as abundant as Petitioner claims (Pet. Br. at 25-26) to the effect that Congress was aware of this Court's decision in *La Buy* and its concern about references of cases to ad-hoc, non-judicial, part-time referees at added cost and generally inevitable delay to litigants. But Congress also was suggesting that both the full time and part time magistrates created by the Act might henceforth be the most appropriate persons to whom the District Courts could turn when the appointment of masters was appropriate – be that in "matters of account and of difficult computation of damages" routinely authorized by Rule 53(b), or in the "exceptional condition" for other matters as contemplated by the Rule and the gloss it received in the *La Buy* decision.

And, third, Congress seems clearly to have intended that magistrates could and would be assigned duties that would be discharged by the magistrate *qua* magistrate. He was to be a new officer of the court, to be assigned duties never before assigned. While the District of Columbia District Court pre-hearing Examiner was a partial model, his duties were in no way intended to define the limits of the responsibilities the new magistrates could be given. As was made clear by Senator Tydings, throughout the legislative considerations of the Act witnesses described two areas of the District Court's duties in which assistance of the type a magistrate could provide seemed appropriate: consideration of pre-trial motions on such matters as discovery in civil and criminal cases and the review of post-conviction requests for relief in criminal cases. Congress responded by mentioning these matters in § 636(b)(2)

and (3) as examples of duties that could be referred to magistrates.[16] But the enumeration was not intended to limit the types of functions the magistrates could perform in their role as magistrates. The specific language of § 636(b) could not be plainer in providing that magistrates may be given duties that "may include but are not restricted to" those listed.

In *amicus'* view, Petitioner has not adequately distinguished between these three separate functions envisioned by Congress and accepted by the courts. Thus, he suggests that Congress intended magistrates "to have only limited authority." Pet. Br. at 8, 13. Congress did intend magistrates to have only limited "authority," if "authority" means the power to decide. The "authority" of magistrates to decide was to be limited to the trials of minor offenses and the circumstances under which any master, considering a matter referred to him under Rule 53, Fed. R. Civ. P.,

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[16]Senator Tydings, Chairman of the Senate Subcommittee on Improvement in Judicial Machinery, testified:

> "The Magistrates Act specifies these three areas [§ 636(b)(1), (2) and (3)] because they came up in our hearings and we thought they were areas in which the district courts might be able to benefit from the magistrate's services. We did not limit the courts to the areas mentioned. Nor did we require that they use the magistrates for additional functions at all.
>
> "We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps *even come up with new areas to increase the efficiency of their courts.*" (emphasis added)
>
> Hearings on the Federal Magistrates Act before Subcommittee No. 4 of House Committee on the Judiciary, 90th Cong., 2d Sess. 81 (1968).

would have authority to act. But the Act was significantly broader than a grant of "authority." It contemplated a function of aid and assistance through as many innovative and useful procedures as the District Courts could envision, so long as the rule and the reality of actual decision-making remained with the District Judges.

Developments subsequent to the enactment of the Act confirm that view:

First, the Senate Report accompanying H.R. 7375, 92d Cong., 2d Sess. (1972), a bill enacted in 1972 to amend the Federal Magistrates Act by raising the salary ceiling for U.S. Magistrates, states:

> "Magistrates are judicial officers of the Federal district courts . . . . They may also be authorized to screen prisoner petitions, hold pre-trial conferences in civil and criminal cases, hear certain preliminary motions, *review social security appeals,* review Narcotics Addict Rehabilitation Act matters, and serve as special masters. In short, they render valuable assistance to the judges of the district courts, thereby freeing the time of those judges for the actual trial of cases." S. Rep. No. 1065, 92d Cong., 2d Sess. 3 (1972) (emphasis added).

The report was written by the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, the same subcommittee that considered the Federal Magistrates Act.

Second, the Administrative Office of the United States Courts has disseminated a "checklist" authorized by the Judicial Conference which sets forth those duties which the Conference considers appropriate for assignment to magistrates under the Act. This checklist provides that magistrates may review the record of

administrative proceedings and prepare a report and recommendations specifically in cases regarding the denial of benefits to claimants under the Social Security Act. This interpretation of the intent of Congress in the enactment of § 636(b) is of particular significance not only because it was distributed by the Director of the Administrative Office of the United States Courts, who is charged by law (28 U.S.C. 604(d)(1)) to supervise all administrative matters relating to the offices of the United States Magistrates, but also since the Administrative Office took a leading role in the development of the Act.

Third, United States District Court Judge Charles M. Metzner, Chairman of the Judicial Conference Committee on the Administration of the Federal Magistrates System, testified earlier this year before a Senate subcommittee considering a bill that would further define the jurisdiction of United States Magistrates, saying:

> "Essentially the magistrate is a judicial officer. He discharges his responsibilities *qua* magistrate, and this is made clear in the proposed subsection 636(b)(1). Any other responsibilities, such as a special master assignment, are set forth in a separate subdivision of section 636(b). It was the lack of clarity in expressing this concept that led to many of the judicial decisions limiting the use of magistrates contrary to what appeared to have been the intent of Congress. In any event, the proposed language clarifies what we think was the original intent in creating the office of magistrate . . ."[17]

[17]Hearings on S. 1283 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 10-11 (transcript of report of proceedings) (1975).

That portion of Judge Metzner's testimony tracks almost verbatim the commentary accompanying a proposed amendment to the Federal Magistrates Act adopted by the Judicial Conference of the United States on March 7, 1975, which reveals that the Conference understood that Congress intended to distinguish a magistrate acting *qua* magistrate as in an administrative review from a magistrate acting *qua* special master.

b. Rule 53, Federal Rules of Civil Procedure.

Rule 53 describes the circumstances under which cases may be referred to special masters. The Magistrates Act specifically contemplates that insofar as magistrates are appointed masters, the reference will be made pursuant to Rule 53. There is no dispute on this issue.

What is disputed is that Rule 53 in any way applies to a reference to a magistrate when the magistrate is not acting as a special master but is performing one of the other duties he has been authorized to perform by the Act and the appointing court. As is discussed in greater detail below, *amicus* finds no basis in the law or in policy for applying Rule 53 to those situations. As is suggested in Judge Metzner's recent testimony on proposed clarifying amendments to the Act, some of the lower courts have declined or vacated references because the reference to the magistrate was viewed as a reference to a master. In *amicus'* view, these cases were either correctly decided, since the order of reference under consideration would have required the magistrate

to serve as a *de facto* master, or they were incorrectly decided because the court failed to distinguish between the duties of the magistrate in his two possible roles:[18] *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972) (incorrectly viewed reference of Social Security Act review as appointment of master); *TPO, Inc. v. McMillen*, 460 F.2d 348 (7th Cir. 1972) (correctly viewed non-consensual reference to magistrate of motion to dismiss as granting adjudicatory functions beyond scope of Magistrates Act); *Reed v. Board of Election Comm'rs*, 459 F.2d 121 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972) (correctly viewed reference of motion for preliminary injunction, requiring hearing, as beyond scope of Magistrate's Act).

Arrayed against these decisions are many more, some specifically in the context of Social Security Act reviews, that affirm the inapplicability of Rule 53: e.g., *Yascavage v. Weinberger*, 379 F. Supp. 1297 (M.D. Pa. 1974) (Social Security Act case); *Bell v. Weinberger*, 378 F. Supp. 198 (N.D. Ga. 1974) (Social Security Act case); *Givens v. W.T. Grant Co.*, 457 F.2d 612 (2d Cir.), *vacated on other grounds*, 409 U.S. 56 (1972) (class action determination); see also *Campbell v. United States Dist. Court*, 501 F.2d 196 (9th Cir. 1974) (motion to suppress in a criminal case).

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[18] *Wingo v. Wedding*, 418 U.S. 461 (1974) is not considered here since it was essentially an interpretation of the Habeas Corpus Act which the Court held was not modified by the subsequently-enacted Federal Magistrates Act. Nor is *Flowers v. Crouch-Walker Corp.*, 507 F.2d 1378 (7th Cir. 1974), discussed, as it revolves around an interpretation of provisions of the Civil Rights Act of 1964.

3. The Department of Justice regulation

In December 1973, prior to any extended experience with the Magistrate's Act, the Department of Justice adopted its regulation directing what may aptly be called "massive resistance" to the reference of cases to magistrates. 28 C.F.R. § 50.11. *Amicus* has been unable to find any contemporary expression of the Department's reasons for adopting the regulation. It was presumably based on the then-recent decisions in *Ingram* and *TPO*, discussed above. See 28 C.F.R. § 50.11(b). It is worth noting, however, that able District Judges, including Judge Jon O. Newman of the District of Connecticut (a former law clerk to Chief Justice Warren) and Judge Marvin E. Frankel of the Southern District of New York (a former Professor on the faculty of the Columbia Law School) have either implicitly or expressly criticized the Department's regulation. See *Arnold v. Weinberger*, Civil No. B-369 (D. Conn. June 24, 1974) (denying a motion by the Secretary of Health, Education, and Welfare to vacate a reference of a Medicare reimbursement case to a magistrate); *United States v. Eastmount Shipping Corp.*, 62 F.R.D. 437 (S.D.N.Y. 1974) (declining to refer to a magistrate as a "master" a claim by the United States against a carrier for cargo damage amounting to about $10,000). As indicated above, it seems explicable only as an expression of constitutional unease.[19] If no

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[19] One court concluded that: "At bottom, the Justice Department is evidently voicing a constitutional concern over excessive delegation of authority to magistrates amounting to an abdication of the judges' Article III powers and responsibilities. *Murphy v. Weinberger*, Unempl. Ins. Rep. ¶17,608, at 2153, 2156 (D. Conn. 1974) quoted in *Bell v. Weinberger*, 378 F. Supp. 198, 202 (N.D. Ga. 1974).

constitutional infirmity to references is now perceived by the Department, then rather than recommending to the Court that it refer this matter to Congress for a re-examination, it should consider an internal re-examination of what Judge Frankel called its "uncompromising position." 62 F.R.D. at 441. *Amicus* does not believe the regulation should stand in the way of the reference challenged in this case.

B. By applying General Order No. 104-D to the facts of this case, a magistrate was not appointed a "special master" within the meaning of 28 U.S.C. §636(b)(1) or Rule 53, Fed. R. Civ. P. Therefore, neither the language of the cited Rule nor its judicial gloss are grounds for vacating the reference.

1. The Magistrates Act does not make a reference of a case of this type a referral to a "master."

General Order No. 104-D, on its face, distinguishes between the appointment of magistrates as masters, (Pet. App. E, at 17A) and the reference of Social Security Act and comparable cases to magistrates for recommended dispositions. (Pet. App. E, at 15A-16A). This reflects the Court's understanding of the distinct roles the Congress envisioned for the new "para-judicial officers."

That a magistrate reviewing the agency record in a case seeking judicial review of decisions by the Secretary of Health, Education, and Welfare under the Social Security Act is not acting as a master, but in the new role established for him by the Magistrate's Act, has been recognized by most courts that have

considered the issue. Only in *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972), did that Court of Appeals assume that a reference of a social security case had to be made under § 636(b)(1), rather than the broader language of the introductory paragraph of § 636(b).

Other courts[20] have rejected the 6th Circuit's analysis recognizing that a magistrate reviewing the agency record in a social security benefits cases is not a "master" acting under § 636(b)(1). The point is perhaps best captured by Chief Judge Sheridan in *Yascavage v. Weinberger*, 379 F. Supp. 1297, 1299-1300 (M.D. Pa. 1974):

> "The holding [in *Ingram*] that the case was, and apparently could only be, referred to the magistrate pursuant to § 636(b)(1), appears to be an unduly restrictive interpretation of § 636 . . . . Service as a master may involve all incidents of a non-jury trial, including the reception of documentary evidence and the taking of testimony where credibility based on demeanor of the witness may be important. The master may also rule on the admissibility of evidence and make findings of fact and conclusions of law: . . . [Reference is made to Rule 53(c) and (e) of the Federal Rules of Civil Procedure]. In a Social Security case, however, there is no trial, no evidence is received and no witnesses are heard;

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[20] *Yascavage v. Weinberger*, 379 F. Supp. 1297 (M.D. Pa. 1974); *Bell v. Weinberger*, 378 F. Supp. 198 (N.D. Ga. 1974); *Kliban v. United States*, Civil No. B-952 (D. Conn., December 2, 1974); *Arnold v. Weinberger*, Civil No. B-369 (D. Conn., June 24, 1974); *Murphy v. Weinberger*, Unempl. Ins. Rep. ¶17,608, at 2153 (D. Conn. 1974).

> rather, the matter is decided on a record developed at the administrative level. The review of a Social Security action involves only the question of law as to whether the Secretary's decision is supported by substantial evidence, and whether proper legal standards were applied . . . . Whether the case is considered initially by the court or the magistrate, disagreement with the Secretary's findings is not permitted when they are supported by substantial evidence. The court, in reviewing the magistrate's report, has before it the same record that the magistrate had before him – a record developed by the Secretary."

A master's authority to make findings of facts is a potentially critical function, as Rule 53(e)(2) dictates that "[i]n an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." In contrast, the magistrate's written discussion and opinion of the merits of a typical social security review are but a recommended ruling as a matter of law fully open to scrutiny and acceptance or rejection by the judge on the same documentary record of fact as that before the magistrate. There is, therefore, no basis for Petitioner's argument that the District Courts are doing indirectly what they could not do directly by referring administrative review cases to magistrates without designating those officers as special masters. It is not the label that counts; it is the substance. And, in substance, the magistrate is performing a new function not contemplated or covered by Rule 53 but very much contemplated by Congress both when it passed the Magistrates Act and, insofar as current evidence is available, since its enactment.

Petitioner analogizes the magistrate to the master with the suggestion that, *de facto*, the magistrate's

recommendation is accepted as though it were a master's findings; in the more colorful language of the First Circuit, that, as with master's findings there may be little more than "a pro forma laying on of the hands by the district court." *Rainha v. Cassidy*, 454 F.2d 207, 208 (1st Cir. 1972) (Pet. Br. at 28-29). Petitioner states that in none of the social security cases referred to magistrates in fiscal 1974 in the Central District of California and the Northern District of Georgia did the court reject the magistrate's recommended decision. (*Id.*). At best, this claim is statistically meaningless because the sample includes only 38 of 277 social security cases in which magistrates filed a report and recommendation throughout the United States.[21] Annual Report of the Director, Administrative Office of the United States Courts 146 (1974). At worst, the claim is deceptive. *Amicus* is advised by a magistrate in the Central District of California that the magistrates of that Court handled 10 social security cases in fiscal 1974; in six, the magistrate's recommendation was neither adopted nor rejected because there was a stipulated remand to the Secretary of the Department of Health, Education, and Welfare; in the remaining four cases, the magistrate's recommendation was adopted, but importantly in three of these neither party to the action exercised its right under the Court's rule

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[21]The Administrative Office of the United States Courts has advised *amicus* that in fiscal 1975, the number of social security cases in which magistrates filed reports (according to preliminary statistics) had increased by 94% to 537; that in the Central District of California the number had increased from 10 to 50; and that in 29 Districts at least one such report was filed.

to submit an objection to that recommendation. In the fourth case the government did file an objection, and although the District Judge adopted the magistrate's recommendation, his decision was in the form suggested by the United States Attorney and not that of the magistrate. A District Judge in the Northern District of Georgia has expressly stated that his District Court reviews all reports and recommendations of magistrates and makes its own independent judgment, citing two cases (not from fiscal 1974) in which the court did not follow the magistrate's recommendation and one case in which the court followed the recommendation but for different reasons. *Bell v. Weinberger,* 378 F. Supp. 198, 201 n.16 (N.D. Ga. 1974). Further, in fiscal 1975, the court rejected the recommendation of the magistrate in at least two cases. *Hollis v. Weinberger,* Civil No. C 74-1120A (N.D. Ga. May 9, 1975); *Trice v. Weinberger,* 392 F. Supp. 1193 (N.D. Ga. 1975).

Certainly it should come as no surprise that in practice the District Courts usually adopt the magistrates' recommended decisions. That fact should prove the competence with which the magistrates are fulfilling their duties, rather than reflect on a lack of diligence by busy District Judges. (Cf. Pet. Br. at 29). United States Magistrates are chosen by a selection process in which all of the Judges of a District Court participate. 28 U.S.C. § 631(a). In the Central District of California, from which this case arises, the initial three magistrates were chosen from more than 125 attorneys who filed written applications with a District Court screening committee, with each of the three that was selected subjected to the same extensive FBI screening procedures that are applied to all federal judicial

appointees. Geffen, *Practice Before the United States Magistrate,* 47 L.A. Bar Bull. 462, 465 (1972). The Magistrates Act also directs the Federal Judicial Center to conduct periodic training programs and seminars for magistrates. 28 U.S.C. § 637. The Magistrates Division of the Administrative Office of the United States Courts advises that the training programs typically offer a session on handling social security cases.

Additional support for the contention that the reference to the magistrate at issue is pursuant to the broader "additional duties" language of § 636(b) and not pursuant specifically to § 636(b)(1) and its special master authorization can be found in the Senate Report to H.R. 7375, which, as previously pointed out (p. 23, *supra*), amended the salary ceiling provision of the Federal Magistrates Act. It lists disjunctively the review of social security cases and service as a special master in a list of duties that a magistrate may be authorized to perform. S. Rep. No. 1065, *supra,* at 1.

Further, the "checklist" disseminated by the Administrative Office of the United States Courts on behalf of the Judicial Conference, referred to above (p. 23, *supra.*), provides that apart from service as a special master, other duties which a magistrate may assume include the review and preparation of a report and recommendations on cases which come before the court on a developed administrative record, particularly Social Security Act cases.

In sum, Petitioner would ignore the statutory directions that the enumerated duties of § 636(b)(1), (2) and (3) are illustrative only. He would have the Court disregard the authority expressly given the District Courts to assign to magistrates a variety of

other duties consistent with their legal status as "para-judicial officers." The Court should give the Act no such crabbed interpretation.

2. Rule 53 does not apply to this case directly; nor do the policy bases for the Rule apply.

The Department of Justice's regulation, expressing a pronounced antipathy to the use of magistrates, purports to be based on the Constitution and on Rule 53, Fed. R. Civ. P. As has already been discussed, *amicus* does not share the Department's constitutional doubts. Even less does he believe the text of Rule 53 or its policy underpinnings require a result other than the one reached by the court below.

As a simple matter of statutory interpretation, it can be said that the Magistrate's Act, to the extent that it conflicts with Rule 53, is a later expression of the legislature's will and, thus, should prevail. See 73 Am. Jur. 2d, Statutes § 255, at 426 (1974). This is no idle suggestion, since it seems to be the fact and is the consensus of commentators[22] that the policy foundations for Rule 53 were considered by Congress but were viewed as applicable only to the use of magistrates when appointed as masters.

[22] *See e.g.*, 9 Wright & Miller, Federal Practice and Procedure § 2603, at 780 (1971); Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases*, 40 U. Chi. L. Rev. 584, 586-588 (1973); Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 791 (1975); *But see* Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 Va. L. Rev. 697, 706-708 (1974).

Rule 53 would seem to express the view of the Court and Congress, first, that unrestricted references to special masters result in an abdication of the decision-making responsibility that is properly that of the district judges, and, second, that the employment of masters adds appreciably – and improperly – to the parties cost and length of litigation. But neither of these considerations should inhibit the reference of a Social Security Act review to a magistrate.

The first concern was succinctly articulated in *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1956), in which the Court stated that the references of two antitrust cases to a special master were improper because

> "[t]hey amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

But more specifically, the court held that it was an abuse of discretion and contrary to the express limitations of Rule 53(b) for a District Judge (1) who had for five years dealt with a myriad of weighty preliminary pleas and motions (2) in cases involving alleged antitrust violations, a class of case in which the judge was himself possessed of great expertise, (3) under circumstances where it was estimated the trial of one case alone would take six weeks and it was reasonable to conclude that much time would be saved at the trials if the Judge heard the cases because of his familiarity with the litigation, (4) over the objection of all parties, (5) referred the entire trials of all issues of fact and law (6) to an active practicing attorney, (7) relying principally upon congestion of his own trial

calendar and the complexity of the cases to justify the references.

No set of facts is more contrary to the circumstances of the present reference. The District Judge has not even seen Respondent's complaint; it was referred under a General Order when filed with the Court. The case calls for a review of a very narrow kind, involving little prospect of complexity but much certainty of laborious search of an administrative record, already made and closed, for the presence or absence of substantial evidence to support the Secretary's findings. It is not the type of case requiring a special expertise by the District Judge. The referral is not for the trial of the case, but only for a thorough study of the record, supplemented, if necessary, by argument, written or oral. The reference is not to a practicing lawyer with distracting other occupations but to a full-time judicial officer, who is the product of an extended selection process. The order is not one Judge's exasperated act to be rid of a troublesome burden but is the product of the entire District Court bench of 16 active Judges, exercising the discretion expressly granted them by Congress in the Federal Magistrates Act. And most importantly, no aspect of the recommendation of the magistrate need be accepted by the District Judge. He is compelled to make an independent judgment. Therefore, the litigants' entitlement to the decision of a Judge of the Court is not at all infringed – unless one makes the unwarranted assumption that the District Judge will fail to perform his duties and resort to a proscribed "pro forma laying on of the hands," an assumption this Court need not and should not make. It should be stated unequivocally that the procedure

under review entails no abdication of the decision-making responsibility of the District Court,[23] which was the primary concern of Congress when it wrote into the Act the requirement that the provisions of the Federal Rules of Civil Procedure be followed in references to magistrates as special masters. S. Rep. No. 371, *supra*, at 25.

The second basis for the "exceptional circumstance" requirement – that a reference to a special master causes the litigants added expenses and delay – is also not a problem here. There has been neither unnecessary expense nor delay when magistrates review Social Security Act cases, at least as far as experience to date may be a guide. Magistrates are compensated by Congress, 28 U.S.C. § 634, and not by the parties; magistrates may not engage in any employment "inconsistent with the expeditious . . . performance of their duties," 28 U.S.C. § 632(a), so that the typical delays caused by the preoccupation of masters with other occupational interests is avoided. Indeed, the scanty evidence to date shows that social security cases referred to magistrates require less time for final decision at the District Court level than cases not so referred. See Pet. Br. at 31 n.38.

The Senate Report that accompanied the Federal Magistrates Act mentions a staff memorandum of the Subcommittee on Improvements in Judicial Machinery which analyzed existing law deemed relevant to the assignment of magistrates as masters. S. Rep. No. 371, *supra*, at 25. Pointing out that the Supreme Court has never established specific guidelines for determining the

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[23] *Cf. Kimberly v. Arms*, 129 U.S. 512, 523-24 (1889).

"exceptional conditions" contemplated by Rule 53(b), the staff memorandum, quoting Kaufman, *Masters in the Federal Courts: Rule 53,* 58 Colum. L. Rev. 452, 457 (1958), concluded that "[i]f the master's function is basically ministerial, then the reference is permissible since 'there is little if any abdication of the judicial function and such matters, rather than tying up the courts, can be more profitably referred to a master.'" In *amicus'* view, the role of a magistrate in a Social Security Act review is quite accurately labeled as basically ministerial. His function is only to aid the District Judge in making a fair, organized, and expeditious decision. This function is in full accord with the directive of *La Buy* that

> "[t]he use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of cause,' *Ex Parte Peterson,* 253 U.S. 300, 312 (1920), and not to displace the court." 352 U.S. at 256.

C. Congress intended to authorize United States District Courts to assign to magistrates duties exemplified by the review of social security benefits cases, and thus there is no necessity for Congress again to consider the matter.

It would be redundant to recount the compelling evidence that indicates Congress intended the Federal Magistrates Act to authorize magistrates to assume duties exemplified by the review of social security benefits cases. Congress did not specifically mention social security cases in the course of its initial consideration of the Act, but did so mention them in reports

accompanying subsequent legislative action. S. Rep. No. 1065, *supra,* at 3. The authority of magistrates to perform such administrative reviews thus seems to fall within the Act's boundaries as defined by its stated purpose, language, and legislative history. The spirit of the statute, which calls for an expansive construction of its terms, is clearly conveyed by its prescription in § 636(b) that the District Courts are authorized to adopt rules assigning to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States."

Amicus therefore believes that Congress has amply expressed its will as to the roles that may be assigned to magistrates. One such role includes the review of executive agency actions as assigned by General Order No. 104-D. Having spoken on the issue, Congress need not speak again. And should the Court mistake congressional intentions, the expansive construction *amicus* urges the Court to adopt can always be modified through congressional revision.

As long ago as 1825 this Court affirmed the ability of all courts to establish rules for the conduct of their judicial business. See *Wayman v. Southard,* 10 Wheat. 1, 42 (1825). This has been read to include the right to provide personnel assistance. *Ex Parte Peterson* 253 U.S. 300 (1920). If neither constitutional nor policy barriers prevent the courts from creating their own helpers, much less utilizing assistants (and assistance) offered by the Congress, why should not the Court accept – indeed, welcome – the innovative procedures the legislature hoped would be applied? There is no sense in remanding to the House of Representatives and Senate. It is the Justice Department that should reconsider its position.

CONCLUSION

This Court needs no *amicus* to recount the increasing caseloads of the District Courts. Suits of just the kind brought by Mr. Weber are among those being filed in exponentially growing numbers. This is a trend that will not be arrested so long as the Nation is committed to expanded social welfare benefits – and no less committed to judicial review of governmental actions withholding benefits claimed.

In enacting the Magistrates Act, the Congress took steps to aid the federal courts in coping with these and their numerous other tasks. But the Constitution limits the types of aides on whom the courts may call for help. The magistrates authorized by this legislation, when used as contemplated by General Order No. 104-D, fit within those limits. No sound policy grounds have been offered for not using them to the fullest extent the Congress intended, the Courts desire and the Constitution and law allows. The judgment of the Court of Appeals should, accordingly be affirmed.

Respectfully submitted,

PETER D. EHRENHAFT
Amicus Curiae, appointed
by this Court*

August 8, 1975

**Amicus* acknowledges with sincere appreciation the assistance of Jonathan L. Kempner, a student entering the third year class at the Stanford University School of Law.

APPENDIX

EXHIBIT A

In Re: [illegible] [illegible]

To the – Supreme Court of the United States
Office of the Clerk,
Washington, D. C. 20543

Gentlemen: Attention, Mr. Michael Rodak, Jr. (Clerk)

Thank you for your letter of March 17, 1975, relative to the matter of the writ of Certiorari filed in the captioned matter. You have set forth that the Court has directed your office to request a response, and referred to certain printed copies together with proof of service factors. It is not clear as to whether this was directed to me for action on my part. If so, I hasten to advise that all of the prior record has indicated that I was taking no part in the APPEAL factor instituted at the outset in order to establish the method of Jurisdiction, i.e. JUDGE OR MAGISTRATE. Since there was never a question of preference on my part either way, I naturally would harbor no arguments on the issues set forth by the opposing sides of the question. I was originally advised in the circumstances that there was no need for me to be involved in matters of procedure toward such determination, and this is the status I have been adhering to. I understand that the

office of Attorney Michael P. Balaban, Esq., has been representing the opposition.

Very Sincerely Yours,

/s/ William G. Weber – in Pro [illegible]

Note – My present Mailing address.
P. O. Box 302,
Sierra Madre, Calif., 91024

Supreme Court, U. S.
FILED
SEP 13 1975
MICHAEL RODAK, JR., CLERK

No. 74-850

In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

WILLIAM G. WEBER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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1. In support of the judgment of the court of appeals sustaining the district court's order providing for the blanket reference of all social security cases to a United States magistrate to prepare a recommended decision, *amicus curiae* contends that in the Federal Magistrates Act Congress "wanted to afford the District Courts maximal room to experiment with the utilization of magistrates and to tailor their employment to the particular problems and requirements of the given court" (Br. 19).[1] In order to avoid what it perceived to be possible constitutional

[1] As *amicus* correctly points out (Br. 2-5), the fact that respondent is not appearing in this Court in defense of the judgment of the court of appeals does not make this any the less a "case or controversy" within the meaning of Article III of the Constitution. See, *e.g.*, *United States* v. *Lovett*, 328 U.S. 303, 306-307; *Granville-Smith* v. *Granville-Smith*, 349 U.S. 1, 4; *Commissioner of Internal Revenue* v. *Stidger*, 386 U.S. 287; *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 210.

questions with respect to the authority of magistrates to perform judicial functions,[2] and in view of the experimental nature of the Act, Congress imposed numerous specific limitations upon the functions that magistrates could perform. Accordingly, while district courts have substantial authority to use magistrates, it is not open-ended or "maximal."

Amicus concedes (Br. 38) that, throughout the extensive legislative consideration of the Federal Magistrates Act, "Congress did not specifically mention social security cases" as one of the tasks that magistrates were authorized to perform. Nor, indeed, has *amicus* found any reference in the legislative history of the Act to any congressional intent to permit magistrates to perform essential elements of the review of administrative decisions that the courts traditionally have performed. Congress simply did not contemplate in 1968 the widespread use of magistrates which the district court's order in this case involves; rather, it was creating a novel institution to which it assigned only limited functions.

Amicus notes that in later congresses some senators apparently have assumed that magistrates may be authorized to handle social security cases (Br. 23-24, 38-39, referring to S. Rep. No. 92-1065, 92d Cong., 2d Sess. 3 (1972)). But even the views of a subsequent congress are entitled to little weight in interpreting the enactments of an earlier congress; *a fortiori* views expressed by individual members of a subsequent

[2] *Amicus* states (Br. 9) that he believes that petitioner's position "is explicable solely in terms of his (or the Department of Justice's) feeling that the broader interpretation given the Federal Magistrate's Act by most of the lower courts might offend Article III," and then argues at some length (Br. 9-17) that interpreting the Federal Magistrates Act as authorizing the magistrates to perform the function involved in this case is constitutional. As *amicus* recognizes (Br. 9), however, we make no claim that authorizing magistrates to perform this function would be beyond the power of Congress. Our sole contention is that in the Federal Magistrates Act Congress has not authorized the routine delegation of this function to magistrates.

congress shed little light, if any, upon what the earlier congress meant.[3] See, *e.g.*, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 348-349; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132.[4]

2. *Amicus* makes no attempt to answer our argument (Pet. Br. 23-29) that, if General Order No. 104-D constitutes a reference of social security cases to magistrates to serve as special masters, it is invalid under Rule 53 of the Federal Rules of Civil Procedure. Instead, *amicus* contends (Br. 25) that the order should not be judged under the standards of Rule 53 because in preparing recommended decisions in social security cases "the magistrate is not acting as a special master but is performing one of the other duties he has been authorized to perform by the Act and the appointing court." As we have shown (Pet. Br.

[3] The statements to which *amicus* refers were made not in connection with any proposed legislation bearing directly on the permissible functions of magistrates, but in a report of the Senate Judiciary Committee on a House-passed bill increasing the limits on magistrates' salaries. See 28 U.S.C. (Supp. III) 634(a). The House Committee Report did not refer to the handling of social security cases by magistrates. See H.R. Rep. No. 92-1037, 92d Cong., 2d Sess. (1972).

[4] Accordingly, the recent testimony of Judge Metzner concerning a pending bill (S. 1283, 94th Cong., 1st Sess. (1975)), quoted by *amicus* (Br. 24-25), is of little assistance in discerning the intent of Congress in 1968. In any event, the bill itself undermines *amicus'* position that the Act already vests courts with "maximal" authority to use magistrates. In revising 28 U.S.C. 636(b)(1) so as to authorize explicitly the referral of "any pretrial matter" to a magistrate for recommended disposition subject to *de novo* review by the judge upon request, the bill excepts "motions which are dispositive of the litigation"; yet social security cases typically are disposed of by precisely such a motion, *i.e.*, one for summary judgment. That the bill would not merely clarify existing law but would give courts new authority to use magistrates is indicated by a provision that would authorize a judge to designate a magistrate to conduct evidentiary hearings and make recommendations for the disposition of applications for post-trial relief, thereby overruling this Court's construction of the Act in *Wingo* v. *Wedding*, 418 U.S. 461.

24), however, in preparing such recommended decisions the magistrates are performing the same functions they would perform if specifically designated as special masters. The fact that General Order No. 104-D does not designate the magistrate's role as that of a special master is immaterial; as *amicus* recognizes (Br. 30), "[i]t is not the label that counts; it is the substance."

Amicus also contends (Br. 34-38) that, to the extent the Magistrates Act conflicts with Rule 53, it supersedes it. The Magistrates Act explicitly provides, however, that service by magistrates as special masters shall be "pursuant to the applicable provisions of * * * the Federal Rules of Civil Procedure * * * ." 28 U.S.C. 636(b)(1). Had Congress intended that Rule 53 would not govern a magistrate's service as a special master, it would hardly have explicitly imposed the contrary requirement, as it did in 28 U.S.C. 636(b)(1). More likely, had Congress intended the Act to override the Rule, it would have included a provision similar to that in a pending bill to amend the Magistrates Act (see n. 4, *supra*), which would amend Section 636(b) to permit magistrates to serve as special masters in civil cases "without regard to the provisions of rule 53(b) * * * ," but only upon the consent of the parties.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

DOJ-1975-09